SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 513.

FRANKLIN KNIGHT LANE, SECRETARY OF THE INTERIOR, AND CLAY TALLMAN, COMMISSIONER OF THE GENERAL LAND OFFICE, APPELLANTS,

vs.

THE PUEBLO OF SANTA ROSA.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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3 Court of Appeals of the District of Columbia.

No. 2981.

THE PUEBLO OF SANTA ROSA, Appellant,
vs.
FRANKLIN KNIGHT LANE, &c., et al.

Supreme Court of the District of Columbia.

No. 33201. In Equity.

THE PUEBLO OF SANTA ROSA, Plaintiff,
against
FRANKLIN KNIGHT LANE, Secretary of the Interior, and CLAY TALLMAN, Commissioner of the General Land Office, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

Bill.

Filed January 28, 1915.

In the Supreme Court of the District of Columbia.

No. 33201. In Equity.

THE PUEBLO OF SANTA ROSA, Plaintiff,
against
FRANKLIN KNIGHT LANE, Secretary of the Interior, and CLAY TALLMAN, Commissioner of the General Land Office, Defendants.

To the Supreme Court of the District of Columbia:

The plaintiff states as follows on information and belief:

I. The plaintiff, the Pueblo of Santa Rosa, is and from time immemorial has been a town known by the common name of
4 Pueblo of Santa Rosa and consisting of civilized, sedentary, agricultural, and pastoral inhabitants who are and from time immemorial have been pueblo Indians known by that name and living in permanent houses of substantial construction in a village, of fixed and permanent location, built upon lands within the present County of Pima, State of Arizona, granted and conceded to said Indian pueblo by the laws and customs of the Indians antedating the Spanish discovery of America and also by the laws of Spain and

Mexico, said lands being within the territory ceded to the United States by the Gadsden Treaty, and to whom, as constituting said pueblo, said laws and customs conceded certain privileges and lands, to be used for the common benefit of the town and its inhabitants.

The inhabitants of said pueblo live and from time immemorial have continuously lived together in communal life in said town community known as the Pueblo of Santa Rosa. They govern and from time immemorial have governed themselves and their town community in accordance with definite laws and customs having the force of law and in their public and private affairs they obey and from time immemorial have obeyed said laws and customs and the lawful orders of officials elected by them in accordance with said laws and customs. They at regular intervals assemble and from time immemorial have assembled together in common council composed of the adult male inhabitants of the town and at said councils have resolved all matters concerning the town community and its inhabitants by rules and decisions having the force of law. They have from time immemorial maintained a high degree of civilization as compared with the wild or savage Indian tribes and have been peaceable except when attacked by savage tribes and have always defeated the attacks of such savage tribes and have never made war on white settlers or resisted established government and have cultivated and utilized the lands of their town community with much intelligence, skill, and industry.

The inhabitants of said pueblo were at the time of the Gadsden Treaty citizens of Mexico with large civil and political rights, and said inhabitants are now citizens of the United States and of the State of Arizona and reside in said pueblo of Santa Rosa, in said County of Pima and State of Arizona.

The laws and customs of the Indians and also the laws of Spain and of Mexico at all times conceded to the plaintiff, and the plaintiff claims and exercises, and from time immemorial has claimed and exercised, (1) the right to have a common name, to wit, the Pueblo of Santa Rosa, and (2) the right and power to take, hold, manage, control, and dispose of real and personal property, including the land upon which its said village is situated and the surrounding lands, and (3) the right and power to contract and otherwise act as an entity by resolutions passed in common councils composed of its adult male inhabitants, and through its officers and representatives, in all matters concerning its interests, property, and affairs, and (4) the right and power to have perpetual succession, and (5) the right and power to sue and be sued as an entity and to appear and act as such before courts and governmental authorities, and (6) the right and power to maintain a permanent town organization and government, and to make, at common councils of its inhabitants, rules and laws binding upon the pueblo and its inhabitants, and to be controlled and managed by its inhabitants acting together according to law and according to rules so made, and to elect and

keep in office captains, alcaldes, and other town officers exercising much power and jurisdiction over said pueblo and its property and inhabitants for their common benefit and for the maintenance of order, the preservation of its property, the promotion of its interests, and the conduct of its affairs.

By reason of the facts above mentioned the plaintiff is, and from time immemorial has been, under the laws of Spain and Mexico and of the United States, an entity in fact and in law and a juridical person entitled to sue as such.

The plaintiff is and from time immemorial has been an Indian town community and one of many pueblo Indian town communities situated within the present and former territory of Mexico, which in character, organization and activity have been and are similar to the plaintiff and which existed as pueblo Indian towns at the time of the Spanish discovery of America and at all times since and which are and at all times have been known and designated in Spanish as pueblos de indios or Indian pueblos.

The plaintiff brings this suit in its own right.

II. The defendant, Franklin Knight Lane, is a citizen of the United States and a resident of the District of Columbia, and at the time of filing this bill was and now is duly appointed, qualified and acting as Secretary of the Interior of the United States of America, and as such is charged with the administration of the laws relating to public lands, and is sued as Secretary of the Interior of the United States of America. The defendant Clay Tallman is a citizen of the United States and a resident of the District of Columbia, and at the time of filing this bill was and now is duly appointed, qualified and acting as Commissioner of the General Land Office of the United States of America, and as such is charged with the administration, under the Secretary of the Interior, of the laws relating to public lands, and is sued as Commissioner of the General Land Office of the United States of America.

III. From time immemorial and since before the first explorations of the Spanish discoverers, and for more than three hundred years prior to the time of bringing this action, the Pueblo of Santa Rosa has owned and actually possessed and occupied all of that certain definite tract or parcel of land situate in Pima County in the State of Arizona, which land includes the village where the inhabitants of said pueblo reside and is bounded and described as follows: Commencing at a point or place known as Kabitque or Mountain Logia plain; thence running south a distance of twenty-four miles more or less to a point or place known as Okama or Okomo; thence running west a distance of twenty-four miles more or less to a point or place known as Mescalero; thence running north a distance of thirty miles more or less to a point or place, known as Sierra
6 Cabeza; thence running east a distance of thirty miles or less to the point or place of beginning; and containing an area of seven hundred and twenty square miles more or less. All of said tract

of land has continuously during all of said period been exclusively and actually occupied and possessed by said pueblo of Santa Rosa under open and notorious claim of right and absolute ownership, and said pueblo and its inhabitants have during all of this period occupied and utilized all of said land for the purposes of agriculture and grazing, and have resided thereupon. The actual boundaries above set forth of said land have from time immemorial been definitely fixed, known and recognized, and are marked by definite and recognized natural monuments, and the ownership, possession, use and occupation of said land by said pueblo and its inhabitants, for the purposes of agriculture and of raising and grazing cattle, of building dwellings and other permanent structures and for all other purposes, have always been coterminous with said boundaries.

IV. Spain during all the period of its sovereignty over the territory including the land herein described at all times recognized and in no instance disputed the ownership of said lands by the Pueblo of Santa Rosa and by repeated royal orders and decrees, recognized the Papago Indians and the inhabitants of said pueblo as free vassals of the Spanish Crown, entitled to all the protection in their property rights which was accorded to Spanish subjects, and recognized and confirmed the ownership of plaintiff in said lands. After the establishment of its sovereignty, Mexico recognized and never disputed the ownership of the land herein described by the Pueblo of Santa Rosa, and during all of the period of Mexican sovereignty the Papago Indians and the inhabitants of the Pueblo of Santa Rosa were Mexican citizens and entitled to and actually enjoyed property rights and all other rights identical with those of all other citizens of Mexico. Under the laws of Spain and Mexico the distinction was clearly recognized and established between savage Indians or indios barbaros, and peaceable Indians living in fixed abodes in permanent communities and subsisting by agriculture and grazing, known as indios de los pueblos or pueblo Indians.

V. The land hereinabove described is situate within the boundaries of the territory ceded by Mexico to the United States under what is known as the "Gadsden Purchase," and in accordance with the treaty made at the time of said purchase and known as the "Gadsden Treaty," and in accordance with the express terms of the treaty known as the Treaty of Guadalupe Hidalgo, all property rights of Mexican citizens were agreed to be inviolably respected by the United States. By the terms of said treaties the Papago Indians and the inhabitants of the Pueblo of Santa Rosa were entitled to become and actually became citizens of the United States. The said citizens of the Pueblo of Santa Rosa, in accordance with the provisions of said treaties, exercised the right given them thereby and elected to become citizens of the United States and they remained in the United States for the period designated by said treaties and did not declare their intention to retain the character of Mexican citizens.

VI. At the time of the acquisition from Mexico by the United States of sovereignty over the territory comprising said land and at the time of the making of said treaties the said pueblo of Santa Rosa was the absolute owner with complete, perfect, and undefeasible title to the land herein described against all governments and individuals and all the world, except such rights as pertained to the inhabitants of said pueblo as members thereof, and since said change of sovereignty this perfect title and ownership has continued to exist and now exists. The inhabitants of said pueblo of Santa Rosa ever since said change of sovereignty have been and now are actually in possession, use, and occupation of all of said lands, except in so far as recently they have been wrongfully disturbed in said use and occupation by trespassers without color of right or title as hereinafter set forth. By the terms of the treaties hereinabove mentioned the ownership of its lands by said pueblo of Santa Rosa was forever guaranteed and secured to it by the United States.

VII. Contrary to the rights of the plaintiff officers and agents of the Department of the Interior and of the Land Office, acting under and in accordance with the instructions of the defendants, have heretofore unlawfully offered and now are offering for entry as part of the public domain of the United States all of the land hereinbefore described. Said defendants and their officers and agents acting under them have heretofore granted pretended patents to third parties, covering portions of said land belonging to the Pueblo of Santa Rosa, and the defendants and their officers and agents acting under them are now threatening to issue other pretended patents to other parties to portions of said land. The defendants and the officers and agents acting under them have repeatedly trespassed upon the said lands belonging to the Pueblo of Santa Rosa and are now threatening to continue said trespasses repeatedly and continuously and are now threatening to enter upon said land within the boundaries thereof and there to make surveys, under the claim that said lands are a portion of the public domain of the United States and are the property of the United States and not of the Pueblo of Santa Rosa. The defendants and the officers and agents acting under them have caused to be published and circulated and are now publishing and circulating and threaten and intend to continue to publish and circulate maps purporting to be official maps of the Department of the Interior, showing that the said lands belonging to the Pueblo of Santa Rosa are part of the public domain of the United States and not owned by the Pueblo of Santa Rosa. The acts hereinbefore complained of will throw a cloud upon the title of the plaintiff to the land aforesaid and will cause many persons to attempt to settle upon the said land and enter the same in the Land Department of the United States, and the plaintiff will be unable to remove such persons without a great multiplicity of suits.

VIII. By the act of Congress of June 20, 1910, for the admission of New Mexico and Arizona as States the United States granted to

the State of Arizona for various purposes more than 2,000,000 acres and provided that the lands so granted should be selected under the direction and subject to the approval of the Secretary of the Interior from public lands of the United States within the limits of
8 Arizona by a commission of State officers and that for the purpose of such selection the State might procure United States public lands within its boundaries to be surveyed in the manner prescribed by the act of Congress approved August 18, 1894, which act was extended to Arizona and provided that from the lands surveyed upon application of the State the State could select and appropriate to itself the lands granted to it within sixty days after the filing of plats of surveys in the district land office of the United States pursuant to that statute. In order to procure such survey and to enable itself to select and appropriate to itself as a part of the lands so granted to it all or a part of the lands belonging to the plaintiff as above described, the State of Arizona has under said last named act applied to the defendant, Clay Tallman, Commissioner of the General Land Office, for the survey of certain land in Arizona, including all said land belonging to the plaintiff. Said application has been granted by the defendants, and the defendants, for the purpose of enabling and aiding the State of Arizona to select and appropriate to itself all or a part of the lands covered by said application including all or a part of the plaintiff's lands, have reserved the lands covered by said application including the plaintiff's lands for a limited time from any appropriation other than the selection by the State, and on or about June 27th, 1913, authorized the Surveyor General of Arizona to immediately survey all said lands covered by said application, including the plaintiff's lands, for the purpose of enabling the State to make its selection and for the same purpose on or about September 5th, 1914, directed the said surveyor general to immediately survey certain designated townships, including a part of the plaintiff's lands and on or about October 6th, 1914, advised the Governor of Arizona how the State should proceed in order to obtain said surveys and to enable itself to make said selections. Said surveyor general of Arizona, acting under the instructions of the defendants, is now surveying, or is about to survey, all of the plaintiff's lands for the purpose of enabling the State to select and appropriate to itself all or a part of said lands and for that purpose the defendants are about to cause to be filed township maps of such surveys in the district land office of the United States in Arizona and to cause such district land office to receive and accept such surveys and thus to enable the State of Arizona, as against these defendants and the United States, to select and appropriate to itself all or any part of the lands covered by such surveys, including the lands of the plaintiff. The governor and other officials of Arizona are about to take proceedings in pretended conformity with said acts of Congress to procure the survey of said lands, including the plaintiff's lands, and to select or appro-

priate to itself all or a part of the plaintiff's lands, and the defendants are about to direct and approve said selection and appropriation and to issue or approve the issuance to said State of patents from the United States covering all or a part of the plaintiff's said lands in disregard of the plaintiff's rights and claims and thus to place a cloud upon the plaintiff's title to its said lands and to put the State of Arizona and its officials in possession of all or a part of the
9 plaintiff's lands as ostensible owners thereof, all contrary to the protests of the plaintiff and in violation of its rights and to its great and irreparable damage.

By the act of Congress of February 19, 1909, known as the Enlarged Homestead Act, it was provided that in Arizona and elsewhere qualified persons may enter three hundred and twenty acres of non-mineral, non-irrigable, unreserved and unappropriated surveyed public lands not containing merchantable timber, provided said lands are first designated by the Secretary of the Interior as not being in his opinion susceptible of successful irrigation at a reasonable cost. By letters or orders dated respectively April 27, 1909, and May 1, 1909, the then Secretary of the Interior designated certain lands including all the lands hereinbefore described belonging to the plaintiff as being subject to entry under said Act and the defendants are causing to be exhibited to the public in the United States District Land Office in Phœnix, Arizona, tract books showing said designation and showing the lands belonging to the plaintiff as being open for entry and sale to settlers under said Act and caused the officials of the United States District Land Office at Phœnix, Arizona, to note upon the public tract books exhibited in said office, as against various townships including the townships comprised within the said lands belonging to the plaintiff words showing that the lands so noted are open to entry as and under proper conditions to allow entries of said lands by settlers. These defendants are now causing to be published and circulated official maps of the Department of the Interior showing the lands belonging to the plaintiff as being open for entry and sale to settlers under said Act and have authorized and ordered surveys to be made of all or a part of said lands and are thus offering said lands to the public for entry and sale under said Act and making it possible for entries to be made thereon and placing a cloud upon the plaintiff's title to its said lands, all contrary to the protests of the plaintiff and in violation of its rights and to its great and irreparable damage.

IX. On or about May 18, 1914, the Pueblo of Santa Rosa, together with other Indian pueblos similarly situated, petitioned defendant Franklin Knight Lane, Secretary of the Interior, setting forth their grievances and various matters of fact and law alleged in this complaint, and prayed that these defendants and those acting under them should abstain from listing for entry or sale as part of the public domain of the United States any part of said parcel of land belonging to the plaintiff and from recommending the issuance of

any patents covering any part of said land and from surveying or making allotment surveys within the boundaries thereof, and that all maps issued or exhibited as official maps by the defendants or those acting under them in the General Land Office or in any District Land Office or in any other office under the direction and control of defendants, and all maps and diagrams contained in publications under the jurisdiction and control of defendants should be altered and corrected so as no longer to show said land as being a part of the public domain, and other relief was prayed for in accordance with the rights of the petitioners as set forth in said petition. Under date of June 11, 1914, the defendant Franklin Knight Lane replied to said petition, finally and definitely denying the said petitioners and the plaintiff all relief of any nature whatsoever, and thereby finally and definitely held, ruled and decided that the land herein described is not the property of the plaintiff but is the property of the United States and a part of the public domain thereof and is under the jurisdiction of the defendants, stating among other things that if the tenure of the holding of the Indians is not by grant emanating from the Government of Spain or Mexico, it is not such a property right as was provided for and protected by the treaty, and that the mere possession of the land as Indian country with the right of use, did not prevent it from passing under the dominion of the United States as public land, whatever the obligation of the United States to the Indians might be and that no claim was presented by the Indians with reference to the lands in question to the Surveyor General of Arizona under the Act of July 15, 1870, and that by the Act of March 3, 1891, a Court of Private Land Claims was created for the adjudication of all private land claims in Arizona and that no claim appeared to have been presented to said court by the Indians, although it is provided by Section 2 of said Act that any claim not presented to such court within two years from the date of the Act shall be deemed to be abandoned and shall be forever barred and that said court having expired by limitation of law on June 30th, 1904, any claim that the Indians may have, can now be confirmed only by an Act of Congress.

X. The plaintiff intends to proceed with all due diligence to enforce in law and equity its rights as the owner of all the lands hereinbefore described.

XI. The land hereinbefore described is of great value, and the value thereof exceeds the sum of one hundred thousand ($100,000) dollars.

XII. The plaintiff alleges that damages at law will be inadequate to remedy the injuries herein set forth and that it has no other adequate remedy at law, and that the acts hereinabove set forth constitute irreparable injuries, and accordingly and forasmuch as plaintiff is remediless and has no adequate remedy or relief except in a court of equity, and to the end, therefore, that the defendants may,

if they can, show why the plaintiff should not have the relief prayed for, and may make full declaration and discovery of record of all the matters aforesaid and according to the best and utmost of their knowledge, remembrance, information and belief, full, true, direct and perfect answer make to the matters hereinbefore stated and charged; but not under oath, answer under oath being hereby expressly waived, plaintiff prays:

First. That the defendants, their officers, subordinates, agents, employees and all those acting under them or by virtue of their instructions and authority be forever enjoined and restrained from offering for entry or listing for entry or sale as part of the public domain of the United States or otherwise any part or parts of said tract of land hereinbefore described, and from issuing or recommending the issuance of any patents, to individuals, the
11 State of Arizona, or otherwise, covering any part of said tract or any interest therein either for homestead, preemption, desert land purposes, or minerals, whether placer or quartz, or for mill sites or for any other purpose or purposes, from making any survey or surveys within the boundaries of said parcel of land except for the purpose of separating and delimiting the said parcel from the public domain, in case said parcel shall adjoin at any point the public domain, from publishing or continuing the publication of any official maps showing said parcel of land or any portion thereof as belonging to the public domain and open for entry or the issuance of patents; from entering on the said parcel without the consent of the town of Santa Rosa; from the establishment of a reservation or reservations upon the said parcel or any portion thereof, and from interfering in any way with the exercise by said pueblo of Santa Rosa of its ownership and control over said parcel of land, and from in any way attempting to exercise power or control over said land or any portion thereof.

Second. That the defendants, their officers, subordinates, agents, employees, and all those acting under them or under their authority or control, be ordered and enjoined to correct, in so far as they may be in their possession or subject to their control, all maps by them issued as official documents and purporting to show the parcel of land herein described as being part of the public domain or the property of the United States so that said maps, as corrected, shall show said parcel of land to be private property and not the property of the United States nor a portion of the public domain; and finally, that the plaintiff shall have such other and further relief as to the court may seem just and equitable.

May it please the court to grant to the plaintiff a writ of subpœna directed to the said defendants Franklin Knight Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the Land Office, commanding them on a day certain to appear and answer this complaint and to abide by and perform such order and decree in the

premises as to the court shall seem proper and required by the principles of equity and good conscience.

Dated October 29, 1914.

THE PUEBLO OF SANTO ROSA,
By HENRY P. BLAIR,
Attorney of Record.

ROUNDS, HATCH, DELLINGHAM & DEBEVOISE,
CATES & ROBINSON,
HENRY P. BLAIR,
Attorneys for Plaintiff.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Henry P. Blair, being duly sworn, deposes and says that he is one of the attorneys for the plaintiff herein; that he has read the
12 foregoing amended bill of complaint and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true; that the reason that his complaint is verified by him and not by the plaintiff is that the plaintiff is absent from the District of Columbia; that the sources of his information and the grounds of his belief are statements made and information given to him by associate counsel familiar with the facts.

HENRY P. BLAIR.

Sworn to and subscribed before me this 30th day of November, 1914.

[SEAL.] ARTHUR HELLEN,
Notary Public, D. C.

Subpœna.

Issued January 28, 1915.

* * * * * * *

The President of the United States to, 1, Franklin Knight Lane, Secretary of the Interior, &, 2, Clay Tallman, Commissioner of the General Land Office, defendants:

You are hereby commanded to appear in this court on or before the tenth day, exclusive of Sundays and legal holidays, after the day of the service of this subpœna upon you and answer the exigency of the bill under pain of attachment and such other process of contempt as the court shall award, and if your appearance in this suit be not entered in the clerk's office within said time the bill may be taken for confessed.

Witness, the Honorable J. Harry Covington, Chief Justice of said court, the 28 day of Jan., A. D. 1915.

[SEAL.] JOHN R. YOUNG, *Clerk*,
By F. E. CUNNINGHAM,
Assistant Clerk.

H. P. BLAIR, *Attorney.*

Marshal's return.

Served copy of within on defendants personally.
Jan'y 28, 1915.

MAURICE SPLAIN, *Marshal.*
C. R. S.

Order for appearance.

Filed January 29, 1915.

* * * * * * *

The clerk of said court will enter our appearance for the defendants.

PRESTON C. WEST,
C. EDWARD WRIGHT,
Attorneys for Def'ts.

18 *Motion to Dismiss.*

Filed February 20, 1915.

* * * * * * *

Come now the defendants in the above-entitled action, by their attorneys, and move to dismiss the plaintiff's bill; and for cause show:

(1) That the bill shows on its face no capacity in the plaintiff, styled as "The Pueblo of Santa Rosa," either to begin or maintain this or any other suit, "in its own right," or otherwise, in that the bill fails to show that the alleged "Pueblo" is a body politic incorporated or existing under the laws of the United States or the State of Arizona, or that it is under any law a body politic and corporate, with power to institute and maintain actions at law or suits in equity.

(2) That, as appears in and by the bill exhibited herein and from well-known facts and laws of which the court will take judicial notice, there is no such thing as a "Pueblo" in law existing in the State of Arizona, with the right to hold or own property, with the privilege to sue or be sued, or to institute or maintain in its alleged name or own right, any suit at law or in equity in any court; but, on the contrary, it appears that said "Pueblo" is merely a settlement of Indians under the tutelage and control of the United States, occu-

pying public lands, the legal title to which is in the United States, by sufferance of said United States, and that said settlement of Indians is without legal entity or capacity to maintain this or any suit.

(3) That in and by the plaintiff's bill, no such title is shown in the so-called "Pueblo" as authorizes the institution and maintenance of any action or suit in the name of the "Pueblo of Santa Rosa" for the relief sought as to the lands mentioned and described in said bill.

(4) That the bill shows on its face that the lands involved were ceded to the United States by the Republic of Mexico under the treaty of Mesilla (commonly known as the "Gadsden Purchase") and that legal title thereto is in the United States, the Indians merely occupying the land by sufferance of the United States; and that therefore the United States is a necessary party to the suit, but has not, in this behalf, consented to be sued.

(3) That the bill seeks to control the discretionary action of the defendants in matters exclusively within their jurisdiction under acts of Congress.

Wherefore they pray that the bill be dismissed with their reasonable costs, and that they be permitted to go without day.

FRANKLIN K. LANE,
Secretary of the Interior.
CLAY TALLMAN,
Commissioner of the General Land Office.

By their attorneys:

PRESTON C. WEST,
Solicitor for the Department of the Interior.
C. EDWARD WRIGHT,
Assistant Attorney.

14 *Opinion.*

Filed April 12, 1916.

* * * * * * *

This is a suit in equity brought by what is called the Pueblo of Santa Rosa against the present Secretary of the Interior and Commissioner of the General Land Office, and sweeping injunctive relief is sought, the first prayer of the bill asking that the defendants, their officers, subordinates, etc., be forever enjoined and restrained from doing a great many things that are outlined in the prayer, which concludes by asking that the injunction sought shall restrain the defendants "from interfering in any way with the exercise by said Pueblo of Santa Rosa of its ownership and control over" the lands described in the bill of complaint "and from in any way attempting to exercise power or control over said land or any portion thereof." By the second prayer of the bill, a mandatory injunction is sought against the defendants, their officers, etc., to require them to correct, in so far as they may be in their possession, or subject to their control, all maps by them issued as official documents and purporting to

show the said parcel of land as being part of the public domain or the property of the United States, so that said maps as corrected shall show said land to be private property and not the property of the United States, nor a portion of the public domain; and there follows the prayer for general relief.

The defendants have filed a motion to dismiss the bill, which motion, under the new equity rules, takes the place of a demurrer. The grounds of the motion are as follows:

"(1) That the bill shows on its face no capacity in the plaintiff, styled as "The Pueblo of Santa Rosa," either to begin or maintain this or any other suit, "in its own right," or otherwise, in that the bill fails to show that the alleged "Pueblo" is a body politic incorporated or existing under the laws of the United States or the State of Arizona, or that it is under any law a body politic and corporate, with power to institute and maintain actions at law or suits in equity.

"(2) That, as appears in and by the bill exhibited herein and from well-known facts and laws of which the court will take judicial notice, there is no such thing as a "Pueblo" in law existing in the State of Arizona, with the right to hold or own property, with the privilege to sue or be sued, or to institute or maintain in its alleged name or own right, any suit at law or in equity in any court; but, on the contrary, it appears that said "Pueblo" is merely a settlement of Indians under the tutelage and control of the United States, occupying public lands, the legal title to which is in the United States, by sufferance of said United States, and that said settlement of Indians is without legal entity or capacity to maintain this or any suit.

"(3) That in and by the plaintiff's bill, no such title is shown in the so-called "Pueblo" as authorizes the institution and maintenance of any action or suit in the name of the "Pueblo of Santa Rosa" for the relief sought as to the lands mentioned and described in said bill.

"(4) That the bill shows on its face that the lands involved were ceded to the United States by the republic of Mexico under the treaty of Mesilla (commonly known as the "Gadsden Purchase") and that legal title thereto is in the United States, the Indians merely occupying the land by sufferance of the United States; and that therefore the United States is a necessary party to the suit, but has not, in this behalf, consented to be sued.

"(3) That the bill seeks to control the discretionary action of the defendants in matters exclusively within their jurisdiction under acts of Congress."

In order that the grounds of the motion may be fully apprehended an analysis of the bill of complaint seems to be requisite.

The bill alleges that the plaintiff is, and from time immemorial has been, a town known by the common name of Pueblo of Santa Rosa, and that it is composed of civilized, sedentary, agricultural and pastoral inhabitants, who are, and from time immemorial have

been, Pueblo Indians, known as such, and living in permanent houses in a village of fixed and permanent location, built upon the lands hereinafter described, which are said to be situated within the present County of Pima, in the State of Arizona, which lands have been granted and conceded to said Pueblo "by the laws and customs of the Indians antedating the Spanish discovery of America, and also by the laws of Spain and Mexico," these lands being within the territory ceded to the United States by the Gadsden treaty.

It is further alleged that the inhabitants of said Pueblo have lived, and continued to live, in communal life in said Pueblo; that they govern, and from time immemorial have governed, themselves and their community, in accordance with definite laws, and customs having the force of law, which have always been obeyed by the inhabitants; that at regular intervals they assemble in common council, composed of the adult male inhabitants of the Pueblo, and that such councils have legislated on matters concerning the Pueblo and its inhabitants by rules and decisions having the force of law.

It is alleged that these people have always maintained a high degree of civilization as compared with the wild or savage Indian tribes, and have always been peaceable and have never made war on white settlers or resisted established government.

It is further alleged that the inhabitants of said Pueblo were, at the time of the Gadsden treaty, citizens of Mexico, with large civil and political rights, and that they are now citizens of the United States and of the State of Arizona. The bill further alleges that "the said laws and customs of the Indians and also the laws of Spain and of Mexico at all times conceded to the plaintiff, and the plaintiff claims and exercises, and from time immemorial has claimed and exercised" all of those rights and privileges that are usually
16 vested in a municipal form of government when established by law, and by reason of these facts the plaintiff claims that it is, and from time immemorial has been, under the laws of Spain and Mexico and of the United States "an entity in fact and in law a juridical person entitled to sue as such;" and it brings this suit in its own right.

In view of these allegations of the bill of complaint, a question arises whether the first two grounds of the motion to dismiss are maintainable. The first of these grounds alleges that the bill does not show any capacity in the plaintiff either to begin or maintain this or any other suit in its own right or otherwise, in that the bill fails to show that the plaintiff is a body politic incorporated or existing under the laws of the United States or the State of Arizona, or that it is under any law a body politic and corporate, with power to institute or maintain suits at law or in equity.

It is true that the bill does not allege in so many words a distinct grant of corporate character, power and authority by action of any sovereignty power, under which the inhabitants of the alleged Pueblo have lived, unless the allegation of the bill to the effect that "the laws and customs of the Indians, and also the laws of Spain and of

Mexico, at all times conceded to the plaintiff" the corporate authority and power claimed in the bill, as quoted above. But the bill does allege, as a matter of fact, and on this motion the allegation must be taken as admitted by the defendants, that from time immemorial the plaintiff has exercised and claimed to exercise the corporate power and powers set out, which include among other things the right and power to sue and be sued as an entity, and to appear and act as such before courts and governmental authorities. Indeed, the bill sets out a form of government somewhat similar in its general characteristics, to the old New England townships; a form of government, simple it is true, essentially democratic in its governmental character, but efficacious as a governmental agency for a simple people living under conditions that present none of the complexities of modern aggregations of people maintaining a varied social order.

The second of the first two grounds of the motion to dismiss alleges that, as appears by the bill of complaint, and from well known facts and laws of which the Court will take judicial notice, there is no such thing as a "Pueblo" in law existing in the State of Arizona, with the right to hold or own property, with the privilege to sue or be sued, or to institute or maintain, in its alleged name or own right, any suit at law or in equity in any court; but, on the contrary, that said "Pueblo" is merely a settlement of Indians under the tutelage and control of the United States, occupying public lands, the legal title to which is in the United States by sufferance of said United States, and that said settlement of Indians is without legal entity or capacity to maintain this or any suit.

Assuming, without deciding however, that the plaintiff has a corporate character which would enable it to maintain in a Court of the United States, suits in the assertion or protection of property rights, let us consider for a moment the character of this particular alleged Pueblo.

17 Its inhabitants are Papago Indians, who are described in that valuable publication issued by the Bureau of American Ethnology in the Smithsonian Institution, called "The Handbook of American Indians," part two, page 200, as:

"A Piman tribe, closely allied to the Pima, whose original home was the territory south and southeast of the Gila River, especially south of Tucson, Arizona, in the main and tributary valleys of the Rio Santa Cruz, and extending west and southwest across the desert waste known as Papagueria, into Sonora, Mexico."

This authority further states that, like the Pima Indians, the Papagos "subsist by agriculture—maize, beans, and cotton formerly being their chief crops, which they cultivated by means of irrigation."

The Handbook further states:

"An extensive trade in salt from the great inland lagoons, was formerly conducted by the tribe, the product finding ready sale at Tubac and Tucson. Their present principal crops are wheat and

barley. They are also stock raisers, and in recent years many of them have gained a livelihood by working as laborers, especially on railroads and irrigation ditches. * * *

"From early times the Papagos have been known as a frugal and peaceable people, although they by no means lack bravery when pressed by their enemy, the Apaches, from whose raids they suffered severely. Their typical dwelling is dome-shaped, consisting of a frame-work of saplings, thatched with grass or leafy shrubs, with adjacent shelters or ramada. These lodges are from 12 to 20 feet in diameter and sometimes the roof is flattened and covered with earth."

The same authority gives us the Papago subdivisions or settlements, so far as known, including, in the list, Santa Rosa. This same authority, speaking of Santa Rosa, on page 460, states it to be "A Papago village south of the Rio Gila and west of Tucson, Arizona."

It is further interesting to note in this connection that, in a report of the surveyor general made in 1861, in pursuance of the provisions of the act of Congress of July 22, 1854 (10 Stat. L., 308), he reports on all the Pueblos in New Mexico, including the territory added to New Mexico by virtue of the Gadsden treaty, and which new territory included the land of the Papagos. The surveyor general gives a list of forty-eight pueblos, and includes among them the pueblo of Santa Rosa, which appears as number forty-six on the list mentioned. Eleven such Papago pueblos are included, with a total population as of the year 1861, of 3,500 persons, and the list is prefaced as follows:

"Statement showing respectively the names of all the Indian pueblos in New Mexico, with their localities, population, wealth, etc. and the times when their land claims were confirmed by Congress and when surveyed, and the areas thereof."

This Papago territory of New Mexico subsequently formed a part of the Territory, later the State, of Arizona.

The Government, in its memorandum brief submitted on behalf of the motion under consideration, defines a pueblo as a village
18 or town, and the definition of pueblo given on page 318 of the "Handbook," from which extracts have already been quoted, is the same; and while the term seems generally to have been applied to designate Indians who lived, or are living, in permanent stone or adobe houses, built into compact villages, the "Handbook" states that these villages are found in Southern Colorado, Central Utah, New Mexico, Arizona, "and extended sometimes to include the settlements of such tribes as the Pima and the Papago, who led an agricultural life."

From the foregoing, it would seem that there has long existed in Arizona the pueblo of Santa Rosa, being a village or town whose inhabitants are a part of the Papago Tribe of Indians, and that pueblos of this character have long existed both in Arizona and in

New Mexico and were in existence prior to the acquisition of this territory by the United States and, so far as anything appears to the contrary, during the period of Mexican rule, and prior thereto during the Spanish rule. It may be true that the inhabitants of the pueblo of Santa Rosa are an agricultural people and have always been, but it does not follow from this that they have not had their town or village, tilling the land which stretched out and away from the town or village.

A consideration of the third and fourth grounds of the motion to dismiss requires a further analysis of the bill of complaint.

The bill alleges that from time immemorial, and since before the first explorations of the Spanish discoverers, and more than three hundred years prior to the institution of this suit, the plaintiff has owned, actually possessed and occupied a tract of land now situated in Pima County in the State of Arizona, containing an area of 720 square miles, more or less, and in and on which the village where the inhabitants of the plaintiff pueblo reside, exists. The land is described by metes and bounds, and it is alleged that during all of the period aforesaid it has been exclusively, actually occupied, and possessed by the plaintiff under open and notorious claim of right and absolute ownership; that said plaintiff and its inhabitants have, during all of said period, occupied and utilized all of said land for the purposes of agriculture and grazing, and have resided thereon; that the boundaries of said land as found in the description by metes and bounds given have, from time immemorial, been definitely fixed, known, and recognized; and the ownership, possession, use, and occupation of said land by the plaintiff and its inhabitants have always been coterminous with said boundaries; that Spain, during its period of sovereignty, and later Mexico, during its period of sovereignty over the territory including said land, always recognized and never disputed the ownership of the same by the plaintiff; and it is situated within the boundaries of the territory ceded by Mexico to the United States by the Gadsden purchase and treaty.

The bill alleges that at the time of the acquisition from Mexico of the territory in question the plaintiff was the absolute owner, with complete, perfect, and indefeasible title to said land, against all governments, individuals, and of the whole world, and since
19 the change of sovereignty from Mexico to the United States, this title and ownership has continued to exist, and now exists; and it is alleged that by the terms of the Gadsden treaty and of the treaty of Guadaloupe Hidalgo, the ownership of these lands by the plaintiff was forever guaranteed to it by the United States.

From the foregoing it will be seen that the bill nowhere alleges a purchase by, or a grant or deed to, the plaintiff of the land in question. The allegations show rather a title by possession and occupation for a period of several centuries, a possession and occupation which, it is alleged, was always recognized and never disputed during the long period of Spanish sovereignty and later during the

period of Mexican sovereignty and control. These are facts that are admitted by the motion to dismiss, though only for the purpose of the motion, and the question then arises whether this shows such a title in the plaintiff as entitles it to the aid of the Court in the manner sought by the bill.

The acts of the defendants complained of are, among others, that they are now offering for entry, as part of the public domain of the United States, all of the land hereinbefore described; that they have heretofore granted pretended patents to third persons, covering portions of said land and are threatening to issue other pretended patents to other parties of other portions of said land; that they have repeatedly trespassed upon said lands, and are threatening to continue such trespasses, and are threatening to enter upon said land and there to make surveys, under the claim that said lands are a portion of the public domain of the United States, and are the property of the United States and not of the plaintiff; and that they have caused to be published and circulated, and are now publishing and circulating, and threatening to continue to publish and circulate, maps purporting to be official maps of the Department of the Interior, showing said land as a part of the public domain of the United States and that these acts will throw a cloud upon the title of the plaintiff to said land, and will cause many persons to attempt to settle upon the land and enter the same in the Land Department of the United States, and that the plaintiff will be unable to remove such persons without a great multiplicity of suits; that pursuant to the Act of Congress of June 20, 1910, providing for the admission of Arizona as a State of the Union, the United States granted to said State more than 2,000,000 acres of land, which was to be selected under the direction and subject to the approval of the defendant Secretary of the Interior, from the public lands of the United States within the limits of said State by a commission of State officers; and that for the purpose of such selection the State might procure the survey of the United States public lands within said State, to be surveyed in the manner prescribed by the Act of Congress, approved August 18, 1894; and to procure such survey, and in order to make the said selection, the State of Arizona has applied to the defendant Commissioner of the General Land Office for the survey of certain lands in Arizona, including all of that belonging to the plaintiff; and that this application has been granted by the defendants, and for this purpose
20 authorized the Surveyor General of Arizona to immediately survey said land, and that said Surveyor General, acting under this authority, is now surveying, or is about to survey, all of the plaintiff's land for the purpose of enabling Arizona to select and appropriate to itself all or a part of said land. And there are other allegations, all of which with more or less particularity show that the United States, acting through the defendants, are treating the lands of the plaintiff as public domain and are disposing of it, or intending to dispose of it, in conformity with either general or special acts of Congress authorizing such disposition.

It is to be noted that the plaintiff has never sought to obtain a recognition of its title by the United States, although the opportunity to do so has been open to it by the provisions of the Act of Congress of July 22, 1854 (10 Stat. 308), and by the later act, creating the Court of Private Land Claims. (26 Stat. 854.) The plaintiff, however, claims that it was not required to do this, because the language of the act establishing the Court of Private Land Claims left it optional with those who claimed a perfect title of going into said court for the purpose of having such title confirmed, and this contention is sustained by the language of the United States Supreme Court in the case of Ainsa vs. New Mexico and Arizona Railroad Company, 175 U. S. 76; and Richardson vs. Amsa, 218 U. S. 289; and the plaintiff claims that its title to the claim has always been perfect.

But we have here a case of land claimed to be owned in fee simple by a village or town in its own corporate right. There is no ownership alleged in the inhabitants of this villake or town, they occupying the land in question in common as inhabitants. The title is claimed by the town, the pueblo, itself.

When the United States acquired sovereign power over the territory which includes this land, the town or village became subject to that sovereignty, and this plaintiff Pueblo at most could only claim that the United States had continued to recognize it as an agency of local government so long as it saw fit to do so. It cannot seriously be doubted that the United States at any time might have put an end to the political character of the plaintiff Pueblo, and when we consider the fact that the inhabitants of this Pueblo were, and are, Indians belonging to the Papago tribe, and when we remember the sweeping authority and control exercised by the United States over the Indians, and such authority frequently sustained by the highest tribunal in the land, no room to challenge its power any longer exists. Bernal et al. vs. Lynch et al., 36 Cal. 135, affirmed 9 Wallace 315; City of Monterey vs. Jacks 139 Cal. 542, affirmed 203 U. S. 360. Also Grisar vs. McDowell, 6 Wallace 363, 372. And this power the Court thinks extends over the lands claimed by the plaintiff Pueblo. The Court has no business to concern itself with the policy of the Government in exercising its power, if it exists. That it does exist with respect to the land claimed by an Indian Pueblo is clearly recognized in the case of United States vs. Sandoval,
21 231 U. S. 28. It is true that in that case the Court did not have before it a suit which directly involved a question of a claim to ownership in fee simple by a pueblo as against the United States. That case was a criminal prosecution for introducing intoxicating liquors into the Indian country, the Pueblo of Santa Clara, in the State of New Mexico. The prosecution had been instituted under an Act of Congress making it a punishable offense to introduce intoxicating liquors into the Indian country, and, by virtue of a later act, the New Mexico enabling act, Congress in terms defined land owned and occupied by Pueblo Indians as Indian country within the meaning of the Act prohibiting the introduction of intoxicating liquor

therein. In the course of its opinion, disposing of the contention thus made, the Court uses this language, page 48:

"It is also said that such legislation cannot be made to include the lands of the pueblos, because the Indians have a fee simple title. It is true that the Indians of each pueblo do have such a title to all the lands connected therewith, excepting such as are occupied under Executive orders, but it is a communal title, no individual owning any separate tract. In other words, the lands are public lands of the pueblo, and so the situation is essentially the same as it was with the Five Civilized Tribes, whose lands, although owned in fee under patents from the United States, were adjudged subject to the legislation of Congress enacted in the exercise of the Government's guardianship over those tribes and their affairs. Stephens vs. Cherokee Nation, 174 U. S. 445, 488; Cherokee Nation v. Hitchcock, supra; Heckman v. United States, 224 U. S. 413; Gritts v. Fisher, id. 640; United States v. Wright, supra. Considering the reasons which underlie the authority of Congress to prohibit the introduction of liquor into the Indian country at all, it seems plain that this authority is sufficiently comprehensive to enable Congress to apply the prohibition to the lands of the pueblos."

While it does not appear that the Government has ever, until the events leading up to the institution of this suit, undertaken to exert any authority over the land particularly described in the bill of complaint as belonging to the plaintiff, the court takes judicial notice of the fact that with respect to other Papago Indian lands, it has quite frequently exerted its claimed authority and power. This has taken the form creating, by Executive orders, Indian reservations. A list of these submitted by counsel for the defendants is as follows:

No. 1. San Xavier Reservation. By President Grant, July 1, 1874. See Executive orders relating to Indian reservations from May 14, 1855, to July 1, 1912, Wash., Gov. Pt. Office, 1912, at p. 23.

No. 2. Gila Bend Reservation. By Pres. Arthur, Dec. 12, 1882. "Executive orders," etc., p. 14.

NOTE.—On June 17, 1909, Pres. Taft "restored to the public domain" Sec. 16 and Sections 19 to 36, of lands within this reservation.

Executive orders, etc., p. 14.

No. 3. Created by Pres. Taft, June 16, 1911, being a part of Sec. 7, township 21 S., range 6 E., Gila and Salt River meridian. Executive orders, etc., p. 23.

22 No. 4. Papago reservation, created June 16, 1911, by Pres. Taft, situate in township 17, range 5.

Executive orders etc., p. 23.

NOTE.—The description of Nos. 3 and 4, as given in "Executive orders," etc., were amended and modified by Executive Order No. 1655, dated December 5, 1912.

No. 5. Cockleburr, Tat-Mahmeli (or Tat-murl-ma-kot), and Chiu-Chiuschu (or Chur Chaw). Created May 28, 1912, by order of Pres. Taft.

Executive orders, etc., p. 24.

No. 6. Ah-Chin, etc. (Maricopa), created by order of Pres. Taft, May 28, 1912.

Executive orders, etc., p. 24.

No. 7. Reservation at Baboquivari, created by Pres. Taft Dec. 5, 1912.

Executive order No. 1655.

The power to establish such reservations has long been recognized by the courts, Grisar v. McDowell, 6 Wall. 363; and reservations thus established have been recognized by Congress in its enactments, 24 Stat. 388, sec 1; and in addition has granted a right of way to the Arizona Southern Railroad Company through one of the Papago Indian reservations thus established in Arizona, 22 Stat. 299; and a right of way to the Citrous Water Company across the Papago Indian Reservation in Maricopa County, Arizona, 25 Stat. 629. It has made appropriations in connection with such reservations, and in addition has appropriated money for the improvement and sinking of wells, etc., for eight Papago villages in Southern Arizona. This was done by an act of Congress approved August 1, 1914 (38 Stat. 583, 588, 594), and by this same act it appropriated $50,000.00 to furnish school facilities for the children of the Papago Tribe of Indians in Arizona, a part of which was stated by counsel for the defendants it is proposed to expend in the plaintiff village or town of Santa Rosa; and by the same act an appropriation was made for nomadic Papago Indians in Pima County, Arizona. The deficiency act of April 6, 1914 (38 Stat. 312, 332), contains an item for the nomadic Papago Indians of Arizona.

It thus is seen that the political departments of the Government have for a considerable period of time claimed and exercised power, authority, and control over the lands occupied by the Papago Indians.

In summing up the matter the case presented by the bill involves a claim of corporate existence on the part of the plaintiff that depends upon user of such corporate power and authority and not by virtue of a grant by any sovereign power whatsoever, unless it be in the rather vague allegations that the laws and customs of the Indians and the laws of Spain and of Mexico at all times "conceded" to the plaintiff the character, power, and authority claimed. Nowhere is there pointed out to the court a grant which has conferred corporate power, but the claim seems rather to be based upon the theory that because some of said laws and customs recognized the existence of pueblos of the kind that the plaintiff is alleged to be,
23 that therefore they have expressly recognized this particular plaintiff as such a pueblo.

As has been pointed out, no express grant of the land claimed by the plaintiff is alleged ever to have been made by Spain, Mexico, or the United States. It has never sought to obtain from the United States a recognition of its claim of title.

The inhabitants of the Pueblo probably do not exceed a few hundred in number. The permanent character of the town or village is at least doubtful when tested by what is clearly recognized as an Indian Pueblo, and it is claiming, under such circumstances, a fee simple title in absolute unrestricted ownership of 720 square miles of land, more or less, under a description by metes and bounds, whose beginning point is at least exceedingly vague, commencing, as it is alleged to do in the bill of complaint, "at a point or place known as Kabitque or Mountain Logia plain."

The Court is of the opinion that the suit thus instituted cannot be maintained. The motion to dismiss is granted, and an order will be signed accordingly.

F. L. SIDDONS, *Justice.*

April 11, 1916.

Decree.

Filed April 25, 1916.

* * * * * * *

This cause came on to be heard on defendants' motion to dismiss the bill of complaint and was argued by counsel; whereupon, on consideration thereof, the court being fully advised in the premises, it is, this 25th day of April, 1916,

Ordered, adjudged, and decreed, That the motion to dismiss be, and the same is hereby sustained, and that the bill of complaint herein filed, be, and the same hereby is, dismissed, with costs to the defendants to be taxed by the clerk.

By the court:

F. L. SIDDONS, *Justice.*

From the above decree an appeal is entered by the plaintiff in open Court to the Court of Appeals of the District of Columbia and the penalty of the bond is fixed at $100.00 or $50 cash deposit in lieu of bond.

F. L. SIDDONS, *Justice.*

Memorandum.

May 13, 1916.—$50 deposited by H. P. Blair for costs on appeal.

24 *Assignment of error.*

Filed June 15, 1916.

* * * * * * *

The Court erred in granting the motion of the defendants and dismissing the bill of complaint.

RALPH S. ROUNDS,
HENRY P. BLAIR,
Attorneys for Plaintiff.

Designation of Record.

Filed June 15, 1916.

* * * * * * *

The Clerk will please prepare the Transcript of Record of the Court of Appeals in the above entitled cause and include therein:

(1.) The bill of complaint.
(2.) Service and appearance of defendants.
(3.) Motion of defendants to dismiss bill.
(4.) Decree dismissing bill.
(5.) Opinion of the Court.
(6.) Noting of appeal and deposit for costs in lieu of bond.
(7.) Assignment of error.
(8.) Designation of record.

RALPH S. ROUNDS,
HENRY P. BLAIR,
Attorneys for Plaintiff.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 36, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 33201 in Equity, wherein The Pueblo of Santa Rosa is Plaintiff and Franklin Knight Lane, Secretary of the Interior, et al. are defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 21st day of June, 1916.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2981. The Pueblo of Santa Rosa, appellant, vs. Franklin Knight Lane, &c., et al. Court of Appeals, District of Columbia. Filed June 24, 1916. Henry W. Hodges, Clerk.

25 Tuesday, March 6th, A. D. 1917.

* * * * *

THE PUEBLO OF SANTA ROSA, APPELLANT,

vs.

FRANKLIN KNIGHT LANE, SECRETARY OF THE INTERIOR, and Clay Tallman, Commissioner of the General Land Office. } No. 2981.

The argument in the above entitled cause was commenced by Mr. Ralph S. Rounds, attorney for the appellant, and was continued by Mr. C. E. Wright, attorney for the appellees, and was concluded by Mr. Ralph S. Rounds, attorney for the appellant.

26 Court of Appeals of the District of Columbia.

THE PUEBLO OF SANTA ROSA, APPELLANT,

vs.

FRANKLIN KNIGHT LANE, SECRETARY OF THE INTERIOR, AND CLAY Tallman, Commissioner of the General Land Office, Appellees.

No. 2981.

Opinion.

Mr. Justice Van Orsdell delivered the opinion of the Court:

This is a suit in equity brought in the Supreme Court of the District of Columbia by plaintiff, the Pueblo of Santa Rosa, to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from undertaking in their official capacity to open its lands to sale, entry and settlement as public lands of the United States.

It is averred in the bill that plaintiff is, and from time immemorial has been, a town known by the common name of Pueblo of Santa Rosa, composed of civilized, sedentary, agricultural and pastorial inhabitants who are Pueblo Indians, and have been known as such, residing in permanent houses in a village of permanent location, built upon lands described in the bill, which are situated within the county of Pima, in the State of Arizona, which lands, it is averred, were granted and conceded to said pueblo "by the laws and customs of the Indians antedating the Spanish discovery of America and also by the laws of Spain and Mexico." These lands are part of the territory ceded to the United States by the Gadsden Treaty. It is also averred that the inhabitants of this pueblo have from time immemorial lived in communal life, and have governed themselves and their community accordingly, with definite laws and customs having

the force of law which have always been obeyed by the inhabitants, and that at stated intervals they assemble in common council composed of the adult male inhabitants of the pueblo and legislate on matters concerning the pueblo and its inhabitants by rules and decisions having the force of law.

It is also averred that "the laws and customs of the Indians and also the laws of Spain and of Mexico at all times conceded to the plaintiff, and the plaintiff claims and exercises, and from time immemorial has claimed and exercised, (1) the right to have a common name, to wit, the Pueblo of Santa Rosa, and (2) the right and power to take, hold, manage, control, and dispose of real and personal property, including the land upon which said village is situated and the surrounding lands, and (3) the right and power to contract and otherwise act as an entity by resolutions passed in common councils composed of its adult male inhabitants, and through its officers and representatives, in all matters concerning its interests, property and affairs, and (4) the right and power to have perpetual succession, and (5) the right and power to sue and be sued as an entity and to appear and act as such before courts and governmental authorities, and (6) the right and power to maintain a permanent town organization and government, and to make at common councils of its inhabitants, rules and laws binding upon the pueblo and its inhabitants, and to be controlled and managed by its inhabitants acting together according to law and according to rules so made, and to elect and keep in office captains, alcaldes and other town officers exercising much power and jurisdiction over said pueblo and its property and inhabitants for their common benefit and for the maintenance of order, the preservation of its property, the promotion of its interests and the conduct of its affairs. By reason of the facts above mentioned the plaintiff is and from time immemorial has been, under the laws of Spain and Mexico and of the United States, an entity in fact and in law and a juridical person entitled to sue as such."

It is also averred that the plaintiff occupies the same position and status as the Pueblo Indian towns of Mexico existing at the time of the Spanish discovery of America, and that "Spain during all the period of its sovereignty over the territory including the land herein described at all times recognized and in no instance disputed the ownership of said lands by the Pueblo of Santa Rosa and by repeated royal orders and decrees, recognized the Papago Indians and the inhabitants of said pueblo as free vassals of the Spanish
27 crown, entitled to all the protection in their property rights which was accorded to Spanish subjects, and recognized and confirmed the ownership of plaintiff in said lands;" that, after the establishment of its sovereignty, Mexico recognized plaintiff's ownership of the land described and during the period of Mexican sovereignty the inhabitants of the Pueblo of Santa Rosa were recognized as Mexican citizens, enjoying property rights and other rights

accorded to citizens of Mexico; that "at the time of the acquisition from Mexico by the United States of sovereignty over the territory comprising said land and at the time of the making of said treaties the said Pueblo of Santa Rosa was the absolute owner with complete, perfect and indefeasible title to the land herein described against all governments and individuals and all the world, except such rights as pertained to the inhabitants of said pueblo as members thereof, and since said change of sovereignty this perfect title and ownership has continued to exist and now exists. The inhabitants of said Pueblo of Santa Rosa ever since said change of sovereignty have been and now are actually in possession, use and occupation of all of said land except in so far as recently they have been wrongfully disturbed in said use and occupation by trespassers without color of right or title;" and that, "by the terms of the treaties hereinabove mentioned, the ownership of its lands by said Pueblo of Santa Rosa was forever guaranteed and secured to it by the United States."

It is also averred that in 1909 the then Secretary of the Interior designated plaintiff's lands as subject to entry under the Enlarged Homestead Act of February 19, 1909; that in 1914 plaintiff petitioned defendant Secretary setting forth its grievances, and prayed that he and his agents "should abstain from listing for entry or sale as part of the public domain of the United States any part of said parcel of land belonging to the plaintiff and from recommending the issuance of any patents covering any part of said land and from surveying or making allotment surveys within the boundaries thereof." The Secretary, on June 11, 1914, replied, denying plaintiff relief, "stating, among other things that if the tenure of the holding of the Indians is not by grant emanating from the Government of Spain or Mexico it is not such a property right as was provided for and protected by the treaty, and that the mere possession of the land as Indian country with the right of use, did not prevent it from passing under the dominion of the United States as public land, whatever the obligation of the United States to the Indians might be and that no claim was presented by the Indians with reference to the lands in question to the surveyor general of Arizona under the act of July 15, 1870, and that by the act of March 3, 1891, a Court of Private Land Claims was created for the adjudication of all private land claims in Arizona and that no claim appeared to have been presented to said court by the Indians, although it is provided by section 12 of said act that any claim not presented to such court within two years from the date of the act shall be deemed to be abandoned and shall be forever barred and that said court having expired by limitation of law on June 30, 1904, any claim that the Indians may have can now be confirmed only by an act of Congress."

The prayer in broad terms is that defendants be restrained from treating the land as part of the public domain and exercising authority over it as such.

Defendants moved to dismiss the bill on the grounds that plaintiff is incapable of bringing or maintaining this suit, because not a body corporate; that it does not own the lands, but merely occupies them by sufferance as part of the public domain ceded to the United States by the Republic of Mexico as part of the Gadsden Purchase; that this, therefore, is a suit against the United States, and that the bill seeks to control the discretionary action of defendants.

From the decree sustaining the motion to dismiss this appeal was taken.

The history and character of the Papago Indians may be gathered from a reference to certain public documents. In 1865 the first superintendent of Indians for Arizona states that "the early Spanish explorer found the Papagos here in 1540, and ruined houses of grand proportions attest their occupancy for thousands of years before the Spaniards came." Ex. Doc., 2d Sess., 38th Cong., Vol. 5, Rep. Sec. of Int., p. 296.

In 1856 the Indian Commissioner, in a report to Congress, said: "The Pueblo Indians maintain their character as peaceable, industrious communities. Some of them have lost the title-papers for the grants of land obtained by them from Spain and Mexico. In such cases their agent has taken testimony in their behalf. They deserve the fostering care of the Government, and Congress will no doubt confirm their titles. About five thousand Indians are embraced within the Gadsden Purchase. They are mostly Pueblos, and reside in six different villages. They have houses and flocks, and raise wheat and other products of the soil." Rep. Sec. of Int., Sen. Doc., 3rd Sess., 34th Cong., Vol. 2.

In the report of the Commissioner of Indian Affairs of 1856, at page 183, the following statement appears: "A large portion of this acquisition to our Indian population consist of Pueblos situated near Tucson. * * * They reside in permanent villages, have comfortable houses built of adobes, have flocks and herds around them, and rely upon the cultivation of the soil for subsistence, raising wheat, corn, cotton, and other vegetables. They are divided into six pueblos or villages, but whether or not they hold their lands under grants from the former Governments of their country I am not informed, but presume they do, as they have been permanently settled for a great number of years."

M. C. Davidson, Indian agent, at page 131 of the Report on Indian Affairs for 1865, said: "The status of the Papagos with respect to the soil ought to be determined in a way that no injustice will be done to them. The Mexican laws, based upon the laws of the Indians promulgated by the kings of Spain, recognized the Indians as subjects or citizens, and in most cases confirmed to them wherever they resided in fixed communities, the titles to the lands where they lived. The Spaniards never made treaties with the Indians nor extinguished the titles to the land, nor did they in any way recognize them as independent nations. Those who now, by the transfer of the

political sovereignty of the country, find themselves upon American soil and surrounded by Americans, look for at least a measure
28 of recognition of their rights equal to that which they enjoyed under the despotic government of Spain. In my opinion, we must regard them as American citizens, and under certain conditions entitled to all their privileges." Rep. Sec. of Int., 1865, p. 299, Ex. Doc., 39th Cong., Vol. 2.

It is conceded, as indeed it must be from a study of Spanish and Mexican history, that plaintiff pueblo has continuously occupied the Valley of Santa Rosa from time immemorial. This logically brings us to a consideration of its legal status. We find that, under both Spanish and Mexican laws, extending from the Spanish invasion down to the cession to the United States, all Indian pueblos were accorded large legal and political privileges, with the power of having municipal self-governments and of choosing local officers with due relation to their responsibility to the public, and the power to hold property and to appear in court and sue and defend on their own behalfs. Each pueblo held title to its land in common, and in general its political and legal status was that of a juridical entity. Indeed, after the Mexican succession, they were elevated to citizenship and civil rights. Hall's Mexican Laws, sec. 161.

The Laws of the Indies, which were begun by decree of Charles V in 1543, and extended by subsequent decrees of the Spanish kings, contain much in recognition of the right of Indian pueblos to their lands in Mexico. In Book IV, Title 12, Law 14 (1578), it is said: "Because we have wholly succeeded to the lordship of the Indies and because the public lands not granted away by the kings, our predecessors, or by us in our opinion belong to our patrimony and royal crown, it is suitable that all the land which is held in possession without just and true titles shall be restored to us as it belongs to us so that, reserving before everything that which to us or our viceroys, courts, or governors may appear necessary for plazas, commons, public lands, pastures, and territory of the inhabited villages and towns in view of their present condition as well as of the future and their possible expansion, and granting to the Indians that of which they may reasonably have need for working the land and making their crops and for their education, confirming them in that which they now have and giving to them in addition that which is necessary, all the rest of the lands may remain and be free and unencumbered to be disposed of according to our will. Wherefore we order and direct the viceroys and presidents of the pretorial courts that when it appears proper to them they shall announce a suitable limit of time in order that those in possession may exhibit before them and the officers of their courts which may name the titles of the lands, plantations, farms, stock farms, protecting those who are in possession with good title and guaranties or with just prescription and they shall return and restore to us the remaining land to be disposed of according to our will."

Further quotation from the same laws confirm the Indians in respect to their titles. "We order that the sale, cultivation and adjustment of lands shall be made with such precautions that to the Indians shall be left the lands which may belong to them, not only as individuals, but also as communities." Book IV, Title 12, Law 18 (1642). "No one shall be allowed to enter into a composition of lands unless he has possessed them for ten years, even though he may allege that he has so possessed them, because this pretext alone must not be sufficient, and the communities of Indians shall be admitted to composition in preference to the other particular persons, granting to them every convenience." Book IV, Title 12, Law 19 (1646). "It is just that the Indians shall have time to work their properties and those of the community and that the viceroys and governors shall proclaim that which may be necessary, to the end that they can come to their farms." Book VI, Title 1, Law 23 (1609).

By the Laws of the Indies, comprehensive provision was made, not only confirming title to lands held by the Indians individually and in common, but establishing regulations for their better government and especially for the protection of their property rights, with ample provision for access to the courts.

By a royal decree of October 15, 1754, respecting public lands which forms the basis of many Mexican titles, the following instructions were promulgated: "The judges and officers in whom is delegated the jurisdiction over the same and composition of crown lands shall act with lenity, forbearance and moderation, with verbal and not judicial process, in questions of lands possessed by Indians, and of other lands which they (Indians) may need, especially for their work, cultivation, and stock raising; since in regard to lands of communities and those granted to their pueblos for pastures and common lands, nothing new must be done, maintaining them in possession thereof and restoring to them those that have been taken from them and giving them more land as the exigencies of the population require, and using no rigor in regard to those held by the Spaniards and people of other castes, keeping in mind the provisions of laws 14, 15, 17, 18, and 19, title 12, Book IV, of the Compilation of the Indies." The decree also provided that, in the absence of title papers, "it shall be sufficient to prove ancient possession as a title by just prescription." 1 Legislacion Mexicana, Mexico, 1876, pp. 13, 14.

The failure to aver the present existence of title in plaintiff pueblo by deed or other writing is not controlling, since its inhabitants have occupied and used the lands in question from time immemorial and their title had been expressly recognized and confirmed by the Spanish and Mexican governments. Referring to the character and validity of the title of the Indian pueblos within the territory ceded by Mexico, the court, in United States v. Pico, 5 Wall., 536, 540, said: "The existence of the pueblo and the assignment to it of the land in question by the officers of the Mexican Government are fully established by the documentary evidence in the case. The objection

of the appellants is founded upon the absence of any transfer of the title to the pueblo by deed or other writing. But such transfer was not essential, nor was it usual. A pueblo once formed and officially recognized became entitled, under the laws of Mexico, to the use of certain lands, for its benefit and the benefit of its inhabitants, and the lands were, upon petition, set apart and assigned to it by the government. No other evidence of title than such assignment was required, nor was any other given."

29 That the inhabitants of the Pueblo of Santa Rosa were citizens of Mexico at the time of the cession to the United States seems to be indisputably established. The question of the status of Indian citizenship in Mexico prior to the cession is exhaustively reviewed in the case of United States v. Ritchie, 17 How., 524. The court, speaking of the power of Indians under the Government of Mexico to take and hold property, said: "In answer to the first objection, we are referred to the plan of Iguala, adopted by the revolutionary government of Mexico, 24th February, 1821, a short time previous to the subversion of the Spanish power in that country, in which it is declared that 'all the inhabitants of New Spain, without distinction, whether Europeans, Africans, or Indians, are citizens of this monarchy, with a right to be employed in any post according to their merit and virtues;' and that, 'person and property of every citizen will be respected and protected by the government.' . . . The Indian race having participated largely in the struggle resulting in the overthrow of the Spanish power, and in the erection of an independent government, it was natural that in laying the foundations of the new government, the previous political and social distinctions in favor of the European or Spanish blood should be abolished, and equality of rights and privileges established. Hence the article to this effect in the plan of Iguala, and the decree of the first congress declaring the equality of civil rights, whatever may be their race or country. These solemn declarations of the political power of the government had the effect, necessarily, to invest the Indians with the privileges of citizenship as effectually as had the declaration of independence of the United States, of 1776, to invest all those persons with these privileges residing in the country at the time, and who adhered to the interests of the colonies. 3 Pet., 99, 121. . . . But as a race, we think it impossible to deny, that, under the constitution and laws of the country, no distinction was made as to the rights of citizenship, and the privileges belonging to it, betwen this and the European or Spanish blood. Equality between them, as we have seen, has been repeatedly affirmed in the most solemn acts of the government."

Concluding, as we must, that the inhabitants of the Pueblo of Santa Rosa were citizens of Mexico and possessed of a valid communal title in the lands embraced therein, we come to a consideration of the effect, if any, the transfer of sovereignty to the United States had upon those rights. By Article IX of the Treaty of Guadalupe

Hidalgo, it was provided that "The Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic, . . . shall be incorporated into the union of the United States and be admitted, at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States according to the principles of the Constitution; and in the meantime shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction."

The Gadsden Treaty, under which the Pueblo of Santa Rosa and its inhabitants passed from the sovereignty of Mexico to the United States, provides: "Art. V. All the provisions of the eighth and ninth, sixteenth and seventeenth articles of the treaty of Guadalupe Hidalgo, shall apply to the territory ceded by the Mexican Republic in the first article of the present treaty, and to all the rights of persons and property, both civil and ecclesiastical, within the same, as fully and as effectually as if the said articles were herein again recited and set forth."

It may be suggested that the foregoing treaty provisions are merely declaratory of the general principles of international law, preserving, in case of change of sovereignty by cession, all the personal and property rights of the inhabitants of the ceded territory. Whatever rights were secured to plaintiff by Mexico prior to cession passed and are granted protection by the new sovereignty. Title respected by treaty obligations is peculiarly sacred. It rests not only on the pledge of protection by the new sovereignty, but upon a solemn guaranty to the old sovereignty that existing personal and property rights shall remain undisturbed. "The rights of private property, so far from having been impaired by the change of sovereignty and jurisdiction, were fully secured by the law of nations, as well as by treaty stipulation." Newhall v. Sanger, 92 U. S., 761, 763.

It will be observed that the treaty of Guadalupe Hidalgo protected all persons, corporations and communities in their rights of property. This included pueblos which, by law and custom, had become vested with interests in lands under the former government. It expressly provided for the protection of the rights of the inhabitants of the ceded territory in their persons and property, and there is nothing from which the inference can be adduced that any distinction was intended with reference to property claimed by towns under the Mexican Government. "By the laws of Mexico, in force at the date of the acquisition of the country, pueblos or towns were entitled, for their benefit and the benefit of their inhabitants, to the use of lands constituting the site of such pueblos and towns, and all adjoining lands, within certain prescribed limits. This right appears to have been common to the cities and towns of Spain from an early period in her history, and was recognized in the laws and ordinances for the settlement and government of her colonies on this continent. These laws and ordinances provided for the assignment to the pueblos or

towns, when once established and officially recognized, for their use and the use of their inhabitants, of four square leagues of land. It may be difficult to state with precision the exact nature of the right or title which the pueblos held in these lands. It was not an indefeasible estate; ownership of the lands in the pueblos could not in strictness be affirmed. It amounted in truth to little more than a restricted and qualified right to alienate portions of the land to its inhabitants for building or cultivation and to use the remainder for commons, for pasture-lands, or as a source of revenue, or for other public purposes. This right of disposition and use was, in all particulars, subject to the control of the government of the country." Townsend v. Greeley, 5 Wall., 326, 336.

It logically follows that there existed, and still exists, in these pueblos a communal right of property which, at most, could only be controlled by specific act of the government itself. It is inconceivable, however, that this controlling power of the government should extend beyond the exercise of the functions of guardianship, for their title to the lands antedates the sovereignty of the United States, and is expressly protected and confirmed by treaty. By no rule of sovereign prerogative existing in our form of constitutional government could these people be divested of their lands without due compensation. Congress has never legislated in respect of the property rights of plaintiff pueblo. Until it does, its administrative officers are without authority to interfere in any respect with those rights. It will not do so say that authority exists under the general legislation of Congress with respect to the Indians and the Indian country. It has never been the policy to so treat the Indian pueblos which came to us with the cession from Mexico. The title to most of them has been confirmed by Congress under a policy entirely foreign to that adopted in dealing with the savage, nomadic Indian tribes. The laws of Spain, and later of Mexico, made no distinction between the Papago Indian pueblos and those within the present limits of the State of New Mexico which have been confirmed in their rights which were recognized by this Government to have been acquired long prior to the transfer of sovereignty from Mexico to the United States.

It follows that by the obligations of the treaty of cession we stipulated not only to protect these former citizens of Mexico in their persons and property, but to accord to them the same treatment with respect thereto as had been accorded them under the former sovereignty. To deprive them now of their lands would be to deprive them of property rights of which they have been vested from time immemorial and which were recognized as such by both Spain and Mexico, and so recognized by this Government in respect of numerous other Indian pueblos similarly situated.

It is no argument that because recently Congress has made certain provisions looking to the exercise of limited guardianship over these people that the administrative officers of the Government may, upon

the theory that they are wards of the Government, treat their lands as public domain and open them to settlement. There is nothing inconsistent with the theory that an Indian, though a ward of the Government, may possess title to lands. The acts of guardianship in this instance place no power in the administrative officers of the Government to interfere in any manner with the property of the ward further than to manage and control it for the benefit of the ward. "As before indicated, by an uniform course of action beginning as early as 1854 and continued up to the present time, the legislative and executive branches of the Government have regarded and treated the pueblos of New Mexico as dependent communities entitled to its aid and protection, like other Indian tribes, and, considering their Indian lineage, isolated and communal life, primitive customs, and limited civilization, this assertion of guardianship over them can not be said to be arbitrary but must be regarded as both authorized and controlling." United States v. Sandoval, 231 U. S., 28, 47.

Even assuming that general acts of Congress relating to the guardianship of the Indians might apply to plaintiff pueblo, it would still hardly be contended that power exists in the officers of the Government to arbitrarily divest them of their lands. Even the savage, nomadic tribes of American Indians, with whom the ancient Mexican Pueblo Indians seem to have little or no racial connection, have been held to possess such a title or interest in their lands as could only be divested by treaty or act of Congress, and then only upon due compensation. No treaty or act of Congress exists or ever has existed touching the status of these Indians in respect of their title to the lands possessed, used and occupied by them from time immemorial.

While in the Sandoval case, the court distinguished the decision in United States v. Joseph, 94 U. S., 614, we assume it related only to the question under consideration of the power of Congress to prohibit the introduction of intoxicating liquor into an Indian pueblo, holding it to be Indian country. This, we conceive, detracts nothing from the authority of the Joseph decision as fixing the distinction between the titles to lands held by Pueblo Indians and those occupied by the nomadic tribes. On this point Mr. Justice Miller, speaking for the court, said: "Turning our attention to the tenure by which these communities (Pueblo Indians) held the land on which the settlement of defendant was made, we find that it is wholly different from that of the Indian tribes to whom the act of Congress applies. The United States have not recognized in these latter any other than a passing title with right of use, until by treaty or otherwise that right is extinguished. And the ultimate title has been always held to be in the United States, with no right in the Indians to transfer it, or even their possession, without consent of the Government. It is this fixed claim of dominion which lies at the foundation of the act forbidding the white man to make settlement on the lands occupied by an Indian tribe. The Pueblo Indians, on the contrary, hold their lands by a

right superior to that of the United States. Their title dates back to grants made by the Government of Spain before the Mexican Revolution—a title which was fully recognized by the Mexican Government, and protected by it in the treaty of Guadalupe Hidalgo, by which this country and the allegiance of its inhabitants were transferred to the United States."

But it is urged that plaintiff pueblo is not a corporation, and, therefore, not entitled to maintain this action. Passing over much interesting history tending to establish its corporate entity by immemorial prescription, we think it is a corporation under the laws of the State of Arizona. When General Kearney was military governor of New Mexico, a statute entitled "An Act to Enable Pueblo Indians to Bring and Defend Actions" was passed, in which it was provided "That the inhabitants within the Territory of New Mexico, known by the name of the Pueblo Indians, and living in towns or villages, built on lands granted to such Indians by the laws of Spain or Mexico, and conceding to such inhabitants certain lands and privileges, to be used for the common benefit, are severally hereby created and constituted, bodies politic and corporate, and shall be known in law by the name of the 'Pueblo de ———' (naming it), and by
31 that name they and their successors shall have perpetual succession, sue and be sued, plead and be impleaded, bring and defend in any court of law or equity all such actions, pleas, and matters whatsoever proper to recover, protect, reclaim, demand, or assert the right of such inhabitants or any individual thereof to any lands, tenements, or hereditaments, possessed, occupied, or claimed contrary to law by any person whatsoever, and to bring and defend all such actions, and to resist any encroachment, claim, or trespass made upon such lands, tenements, or hereditaments belonging to said inhabitants or to any individual." Laws of New Mexico, 1851–1852.

In 1850 New Mexico was created a Territory (9 Stats. L., 446), by which general legislative authority was vested in the Territorial Legislature. The first legislature enacted "That all laws that have previously been in force in this Territory that are not repugnant to, or inconsistent with, the Constitution of the United States, the organic law of the Territory, or any act passed at the present session of the legislative assembly, shall be and continue in force, except in Kearney's Code the law concerning registers of land." Laws of New Mexico of 1852.

This brought the Kearney Act forward into the laws of New Mexico. The Papago Indian lands here in question were included in the Gadsden Purchase of 1854 and Congress, by act of August 4, 1854 (10 Stats. L., 575), enacted "That, until otherwise provided by law, the territory acquired under the late treaty with Mexico, commonly known as the Gadsden treaty, be, and the same is hereby incorporated within the Territory of 'New Mexico,' subject to all the laws of said last-named Territory."

By the act of Congress of February 24, 1863 (12 Stats. L., 664), the Territory of Arizona was created out of territory formerly embraced within New Mexico. The act continued in force the act creating the Territory of New Mexico, "together with all legislative enactments of the Territory of New Mexico not inconsistent with the provisions of this act," which "are hereby extended to and continued in force in the said Territory of Arizona until repealed or amended by future legislation." We have been unable to find anything in the constitution or laws of Arizona repealing or in any manner affecting the corporate status of Indian pueblos as fixed by the Kearney statute. The validity of the Kearney Act was upheld in Leitensdorfer *v.* Webb, 20 How., 176.

Nor is this a suit against the United States to control the discretionary functions of its officials. This is not public domain of the United States in that it comes within the general acts of Congress imposing upon the Secretary of the Interior general-supervisory control over the public lands. It is an Indian pueblo of the class of the New Mexican pueblos in which the Government has recognized and confirmed title existing at the date of cession and protected by the treaty. Indeed, the only act of Congress that has been called to our attention affecting directly the title of Papago lands was in effect a recognition of their title. The act of 1882 (22 Stats. L., 299), granted a right of way to the Arizona Southern Railroad Company across the Papago Reservation, but specifically provided "That the consent of the Indians occupying said reservation be first obtained, and such compensation as may be fixed by the Secretary of the Interior be paid to him by the said railroad company, to be expended by him for the benefit of the said Indians." The act is significant of guardianship, but negatives any disposition on the part of the Government to assert ownership. No question of the boundary is here involved, since the boundaries set forth in the bill are concededly correct under the admissions of the motion to dismiss. Hence, defendant officers are acting totally without their jurisdiction. In such cases the courts will not hesitate to interfere. Gauthier v. Morrison, 232 U. S., 452; Lane v. Wade, 234 U. S., 525.

We come now to the claim of counsel for the Government that plaintiff is barred by its failure to assert its title before the Court of Private Land Claims or before the Land Commission created by the act of Congress of July 22, 1854 (10 Stats. L., 308). The act of 1854 was limited to Mexican land grants within the limits of California. It contained a provision for the absolute forfeiture to the United States of lands claimed if the grantee failed to present his claim to the commission before a specified date. This forfeiture provision was held valid and enforceable. Botiller v. Dominguez, 130 U. S., 238; Barker v. Harvey, 181 U. S., 481. But this law has no present application, since the lands in question are not situated in California and hence were not within the jurisdiction of the commission.

The act of March 3, 1891 (26 Stats. L., 854), creating the Court of Private Land Claims provided, among other things:

"Sec. 6. That it shall and may be lawful for any person or persons or corporation, or their legal representatives, claiming lands within the limits of the territory derived by the United States from the Republic of Mexico and now embraced within the Territories of New Mexico, Arizona, or Utah, or within the States of Nevada, Colorado, or Wyoming, by virtue of any such Spanish or Mexican grant, concession, warrant, or survey as the United States are bound to recognize and confirm by virtue of the treaty of cession of said country by Mexico to the United States which at the date of the passage of this act have not been confirmed by act of Congress, or otherwise finally decided upon by lawful authority, and which are not already complete and perfect, in every such case to present a petition, in writing, to the said court," etc.

"Sec. 8. That any person or corporation claiming lands in any of the States or Territories mentioned in this act under a title derived from the Spanish or Mexican Government that was complete and perfect at the date when the United States acquired sovereignty therein, shall have the right (but shall not be bound) to apply to said court in the manner in this act provided for other cases for a confirmation of such title; and on such application said court shall proceed to hear, try, and determine the validity of the same and the right of the claimant thereto, its extent, location, and boundaries, in the same manner and with the same powers as in other cases in this act mentioned."

It will be observed that it was left optional with persons claiming complete title to come into the Court of Private Land Claims. No penalty or forfeiture was imposed upon such claimant for failure to submit himself to the jurisdiction of the court. In Ainsa v. 32 New Mexico & Arizona Railroad, 175 U. S., 76, it was held that Mexican or Spanish grants complete at the time of cession were confirmed by the treaty itself and needed no confirmation by Congress. The reason for making the presentation of completed claims optional was stated in Richardson v. Ainsa, 218 U. S., 289, as follows: "But considerations mentioned in the case cited (Botiller v. Dominguez) did not prevent the United States in the act of March 3, 1891, from leaving the holders of perfected titles free not to present them to the court as they were required to do in earlier statutes. The good faith of the United States was pledged to respect the Mexican titles. It recognized in the act of 1891 that holders of such titles need not go into the Land Claims Court to get them confirmed, and we should be slow to suppose that it meant to make a doubt in the Department of Justice as to the validity of a perfect title a ground for cutting down what otherwise it was bound to protect and did by the statute leave intact."

With this distinction before us it is clear that plaintiff lost nothing by failure to assert its title before the Land Claims Court. What-

ever title plaintiff has it acquired long prior to the cession from Mexico. Its status was in no respect affected by the change of sovereignty. Nor, as we have observed, has it been changed by act of Congress. Its communal pueblo or village title was as little subject to impairment by change of sovereignty as that of a private individual Spanish or Mexican grantee. The court below laid stress upon the principle that plaintiff, being a pueblo or village, a mere agency of the Government, it lay within the sovereign power at any time to put an end to its political character or existence. But this is an assumption without a premise. No such thing has been attempted; and, so long as the pueblo continues, its property rights remain subject to protection by the laws of the land, with a duty of enforcement resting upon the courts. Indeed, its peculiar origin, antedating every national sovereignty under which it has existed, may well distinguish it from the ordinary municipality with authority to exercise only those limited powers conferred by the express terms of a corporate charter granted by the State. It is more in the nature of a corporation by immemorial prescription recognized by the State, but exercising governmental functions of its own, independent of any express statutory regulations prescribed by the State.

It is unnecessary, however, to consider the more difficult question of the extent of the power of Congress to control plaintiff's title or abolish its corporate existence by legislative enactment, since it has not been attempted. The Land Department fell into error in placing the Papagos in the same classification with the original nomadic North American Indian tribes and attempting to apply to their property the general law affecting Indian lands and property. We find plaintiff, at the time of the cession from Mexico, to be a pueblo of the same legal status as the New Mexican pueblos whose title was recognized and confirmed in fee simple by the act of Congress of December 22, 1858 (11 Stats. L., 374). It follows, therefore, that whatever power Congress may have to control plaintiff's land, no such power has been asserted, and this power can not be assumed by the Land Department to the extent of opening the land to settlement and disposing of mineral rights therein.

The decree is reversed with costs, and the cause is remanded with directions to enter a decree restraining defendants from offering for entry or listing for entry or sale as part of the public domain of the United States any of said lands under any land or mineral land law of the United States and requiring, in so far as lies within their power or control, the correction of the records of the Land Department to prevent, in as large degree as possible, any further infringement upon the property rights of plaintiff.

Reversed and remanded.

33 Friday, April 27th, A. D. 1917.

* * * * * * *

THE PUEBLO OF SANTA ROSA, APPELLANT, vs. FRANKLIN KNIGHT LANE, SECRETARY of the Interior, and Clay Tallman, Commissioner of the General Land Office.	No. 2981.	April Term, 1917.

Appeal from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said Supreme Court in this cause be and the same is hereby reversed with costs; and that this cause be and the same is hereby remanded to the said Supreme Court with directions to enter a decree restraining defendants from offering for entry or listing for entry or sale as part of the public domain of the United States any of said lands under any land or mineral land law of the United States, and requiring, in so far as lies within their power or control, the correction of the records of the Land Department to prevent in as large degree as possible any further infringement upon the property rights of plaintiff.

per Mr. Justice Van Orsdel,
April 27, 1917.

34 In the Court of Appeals of the District of Columbia.

PUEBLO OF SANTA ROSA, APPELLANT, vs. FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND Clay Tallman, Commissioner of the General Land Office.	No. 2981.

Petition for allowance of appeal.

Come now Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, appellees in the above-entitled cause, by their attorneys, and show that on or about the 27th day of April, 1917, the court entered a judgment herein in favor of the appellant and against the appellees, reversing a decree of the Supreme Court of the District of Columbia in favor of the appellees, in which judgment of the Court of Appeals certain errors were committed to the prejudice of the appellees, all of which will appear more in detail from the assignment of errors filed with this petition.

The appellees further show that the said judgment of this court is subjected to reveiw by the Supreme Court of the United States under the provisions of the first paragraph of Section 250 of the Judicial Code in that the jurisdiction of the trial court to review or to control any or all actions complained of in the bill of complaint is in issue.

The appellees further show that the said judgment is subject to review by the Supreme Court of the United States under the provisions of the third paragraph of said section 250 in that the construction of certain treaties entered into under the authority
35 of the United States, to wit, the treaties of Guadalupe Hidalgo and Mesilla, are drawn in question.

The appellees further show that the said judgment is subject to review by the Supreme Court of the United States under the provisions of the fifth paragraph of section 250, in that the validity of an authority exercised under the United States and the existence and scope of a power or duty of the appellees, said appellees being officers of the United States, are drawn in question.

They further show that said judgment is subject to review by the Supreme Court of the United States under the provisions of the sixth paragraph of said section 250 in that the proper construction of certain acts of Congress, to wit, the Act of July 22, 1854, (10 Stat., 308) and the Act of March 3, 1891 (26 Stat., 854), is drawn in question by the appellees, who were defendants below.

Wherefore they pray the allowance of an appeal to the Supreme Court of the United States for the correction of the errors complained of; that a transcript of the record, proceedings, and papers in the case, duly authenticated may be sent to the Supreme Court of the United States; and that the mandate of this court may be stayed until further orders.

FRANKLIN K. LANE,
Secretary of the Interior.
CLAY TALLMAN,
Commissioner of the General Land Office.

By their attorneys:

CHARLES D. MAHAFFIE,
Solicitor.
C. EDWARD WRIGHT,
Assistant Attorney.

36 In the Court of Appeals of the District of Columbia.

PUEBLO OF SANTA ROSA, APPELLANTS,
v.
FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, and Clay Tallman, Commisioner of the General Land Office. } No. 2981.

Assignment of errors.

Come now the appellees in the above-entitled cause, by their attorneys, and say that in the record and proceedings of the Court of Appeals, and in the rendition of their final judgment therein, manifest error has intervened to the prejudice of said appellees, in this to wit:

1. That the court erred in reversing the decree of the Supreme Court of the District of Columbia in favor of the appellees and against the appellant, and in remanding the case with directions to enter a decree restraining the appellees from offering for entry or listing for entry or sale as part of the public domain of the United States any of the lands in controversy under any land or mineral law of the United States as requiring the correction of records of the Land Department as outlined in the concluding paragraph of the opinion of said court.

2. That the court erred in not affirming the decre of the Supreme Court of the District of Columbia dismissing appellant's bill.

3. That the court erred in ruling and holding that the appellant possessed legal title of any character under the laws of Spain or Mexico to the lands in controversy, and was seized of the same at the time when the sovereignty of Mexico was surrendered and

37 transferred to the United States.

4. That the court erred, in arriving at such conclusion, in considering certain alleged foreign laws and decrees neither exhibited in the pleadings nor shown in evidence by the appellant.

5. That the court erred in holding that the appellant had a perfect legal title to the land at the time of the making of the treaty of Mesilla.

6. That the court erred in failing to hold that whatever title or property right to the land in question held by the Papago Indians located at Santa Rosa, under Spanish or Mexican law or custom, was imperfect and inchoate, and required, under the terms of the treaties of Guadaloupe Hidalgo and Mesilla, action, adjudication, and confirmation under laws of the United States made with reference to such claims.

7. That the court erred in failing to rule that a proper construction of either or both said treaties required an adjudication or confirmation of any title to lands transferred to the sovereignty of the United States where said titles were not complete and fully established by record.

8. That the court erred in holding and deciding that the act of July 22, 1854 (10 Stat., 308), was confined in its operations to land

situate within the State of California and did not relate to lands situate within the then territory of New Mexico.

9. That the court erred in holding and deciding that the claim of the appellant was not one of a character which it was obliged to submit to the Court of Private Land Claims under the act of March 3, 1891.

10. That the court erred in confusing the status of the appellant with that of the Pueblo Indians of New Mexico, whose grants were adjudicated and confirmed under the provisions of the act of July 22, 1854, and ultimately patented to the several pueblos by the United States, whereas the bill fails to show that the Papagos of Santa Rosa ever had a grant of land from Spain or Mexico, or ever solicited
38 or procured an adjudication by the Surveyor General of New Mexico, acting under said act of July 22, 1854, of the legality or validity of such claim, or ever secured the confirmation of such claim by Congress, or procured a patent for said land from the United States.

11. That the court erred in construing the treaties of Guadaloupe Hidalgo and Mesilla as obligating the United States in effect to treat and regard the lands occupied by the Papagos at Santa Rosa as possessed by them in common in fee simple.

12. That the court erred in failing to hold and decide that whatever right said Indians have in respect of the lands in controversy is an occupancy right, the ultimate title in fee to the said lands being in the United States.

13. That the court erred in failing to hold and decide that the appellees, acting under general authority of Congress conferred, are charged with the general guardianship of said Indians and with the care and control of the lands occupied by them.

14. That the court erred in ruling and holding that the appellant possesses legal entity with capacity as the "Pueblo of Santa Rosa" to begin or maintain, in such name, this or any suit in any court.

15. That the court erred in ruling and holding that the appellant was and is a corporation by virtue of the so-called Kearney Act.

16. That the court erred in failing to recognize and respect the paramount authority of the President of the United States exercised in his Executive order of January 14, 1916, setting aside the land in controversy as well as other lands as a reservation for the benefit of the Papago tribe of Indians.

17. That the court erred in ordering and directing, in the demanding of the case, the entering of a final decree restraining appellees from the performance of certain acts enumerated in the concluding paragraph of the opinion when, as in the opinion elsewhere appears, the case was before said court of appeals on an appeal from a
39 decree sustaining the demurrer (or motion to dismiss) of the appellees and dismissing the appellant's bill; whereas, under the rules of the Supreme Court of the District of Columbia and under practice obtaining in the courts of the United States, the appellees have a right to file answer to the bill if the sufficiency of

a demurrer (or motion to dismiss) is not sustained; and wherefore, by the judgment of the court of appeals aforesaid, the appellees are deprived of a substantial right—the right to plead over by answer to the bill of complaint in a suit where, if opportunity were afforded or required, every material allegation of fact in the bill of complaint would be denied.

18. That the court erred in failing to rule and to decide that the fee simple to land in controversy was transferred by the Republic of Mexico to the United States, under the treaty of Mesilla, subject to no more, if at all, than a mere occupancy right in the Indians; but that as to any question as to whether appellant has a title superior to that of the United States—that is to say, the legal title in fee simple acquired prior to the transfer of sovereignty from the Republic of Mexico to the United States—the United States is a necessary party to any suit wherein such title is asserted.

19. That the court erred in not affirming the decree of the Supreme Court of the District on the ground, if on no other ground, that this suit is essentially one against the United States, which is not a party to the suit and has not, in respect to any matter hereof, consented to be sued, but, on the contrary, has, through its Chief Executive and through its Congress since, as well as before, the institution of this suit, asserted rights in and power over the appellant and the land in controversy, in denial of any such title to the land as appellant asserts and as the said court of appeals, in the decision complained of, upholds.

Wherefore the appellees pray that for the errors aforesaid and other errors appearing in the record of said court of appeals the said judgment of said court may be reversed, annulled, and for naught esteemed, and that said cause be remanded with instructions to affirm the decree of the Supreme Court of the District of Columbia in said suit rendered or for such further proceedings in said suit in recognition and in protection of the rights of the appellees as may be determined by the Supreme Court of the United States to the end that justice may be done in the premises.

FRANKLIN K. LANE,
Secretary of the Interior.
CLAY TALLMAN,
Commissioner of the General Land Office.

By their attorneys:

CHARLES D. MAHAFFIE,
Solicitor.
C. EDWARD WRIGHT,
Assistant Attorney.

(Endorsed:) No. 2981. Pueblo of Santa Rosa vs. Franklin K. Lane, Secretary of the Interior, et al. Petition for allowance of appeal and assignment of errors and stay of mandate. Court of appeals, District of Columbia. Filed May 8, 1917. Henry W. Hodges, clerk.

41 Saturday, May 12th, A. D. 1917.

* * * * * * *

THE PUEBLO OF SANTA ROSA, APPELLANT,
vs.
FRANKLIN KNIGHT LANE, SECRETARY OF THE INTERIOR, and Clay Tallman, Commissioner of the General Land Office. } No. 2981.

On consideration of the petition for the allowance of an appeal to the Supreme Court of the United States and to stay the mandate until further order in the above entitled cause, it is by the court this day ordered that said petition be, and the same is hereby, granted.

42 United States of America, ss:

To the Pueblo of Santa Rosa,
Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Franklin Knight Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the appellants should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Chas. H. Robb, Associate Justice of the Court of Appeals of the District of Columbia, this 12th day of May, in the year of our Lord one thousand nine hundred and seventeen.

CHAS. H. ROBB,
Associate Justice of the Court of Appeals of the District of Columbia.

Service acknowledged:

HENRY P. BLAIR,
Counsel for Appellee.

43 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 40, inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals in the case of The Pueblo of Santa Rosa, appellant, vs. Franklin Knight Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, No. 2981, April term, 1917, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 21st day of May, A. D. 1917.

[SEAL.] HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

(Indorsement on cover:) File No. 25974. District of Columbia Court of Appeals. Term No. 513. Franklin Knight Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, appellants, vs. The Pueblo of Santa Rosa. Filed May 23d, 1917. File No. 25974.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

FRANKLIN KNIGHT LANE, SECRETARY OF the Interior, and Clay Tallman, Commissioner of the General Land Office, appellants,

v.

THE PUEBLO OF SANTA ROSA.

No. 197.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

The Secretary of the Interior and the Commissioner of the General Land Office by this appeal bring up for review a judgment of the Court of Appeals of the District of Columbia reversing the decision of the Supreme Court of the District of Columbia and remanding the case to that court with directions to enter a final decree restraining the Secretary and the Commissioner from offering for entry or listing for entry or sale, as a part of the public domain of the United States, any of the lands

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described in the bill as being lands held by fee-simple title by the Indians of the Pueblo of Santa Rosa in the State of Arizona, and requiring "in so far as lies within their power or control, the correction of the records of the Land Department to prevent in as large degree as possible any further infringement upon the property rights of the plaintiff" (R. 38).

The bill alleges that the plaintiff is, and from time immemorial has been, a town known by the common name of Pueblo of Santa Rosa, composed of civilized, sedentary, and pastoral inhabitants who are, and from time immemorial have been, Pueblo Indians, known by that name and living in permanent houses of substantial construction within the present county of Pima, State of Arizona, said lands being within the territory ceded to the United States by the Gadsden treaty (R. 1–2); that the inhabitants of said pueblo live a communal life and are known as the Pueblo of Santa Rosa; that they have governed themselves according to definite laws and customs having the force of law; that the inhabitants of said pueblo were at the time of the Gadsden treaty citizens of Mexico and are now citizens of the United States; that the laws and customs of the Indians and of Spain and Mexico conceded to the plaintiff, and the plaintiff has exercised from time immemorial, (1) the right to have a common name, the Pueblo of Santa Rosa, (2) the right to hold and dispose of real estate, including the land upon which the village is situated and the surrounding lands,

(3) the right to contract, (4) the right and power to have perpetual succession, (5) the right to sue and be sued as an entity, (6) the right to maintain a town organization and government, and that by virtue of this right is in fact and in law entitled to sue as such (R. 2, 3); that from time immemorial the Pueblo of Santa Rosa has owned, possessed, and occupied the tract of land in Pima County, an area of 720 square miles, on which the village exists; that the boundaries of said land have been definitely fixed and known and recognized, and the ownership and possession of the village by its inhabitants were conceded and never disputed by the sovereignties of Spain and Mexico (R. 3, 4); that at the time of the acquisition of New Mexico by the United States the Pueblo of Santa Rosa was the absolute owner with complete, perfect, and indefeasible title to the land described, and ever since that time has been in peaceable possession thereof (R. 5).

The bill also alleges that, contrary to the rights of the plaintiff, the Department of the Interior and the Land Office unlawfully offered for sale and are now offering for sale as a part of the public domain of the United States all the land described, and that patents to third parties have been granted covering portions of said land belonging to the Pueblo of Santa Rosa, and that the defendants were threatening to issue patents to other parties to portions of the said land; that the defendants have caused to be published and circulated, and are now publishing and circulating, maps purporting to be official maps of

the Interior Department of the lands of the Pueblo of Santa Rosa as a part of the public land of the United States (R. 5).

The prayer of the bill is for a mandatory injunction to restrain the defendants from interfering in any way with the exercise by the Pueblo of Santa Rosa, as owners and controllers of the land described in the bill of complaint, and to require them to correct all maps issued by them as official documents purporting to show that the land described is a part of the public domain (R. 9).

The defendants filed objections and a motion to dismiss said bill as permitted by Rule 32 of the Supreme Court of the District of Columbia (R. 11).

The motion to dismiss stated the following grounds:

First. That the bill shows on its face no capacity of the plaintiffs to begin and maintain this or any other suit, in that it fails to show that the Pueblo of Santa Rosa is a body politic incorporated or existing under any law of the United States or the State of Arizona.

Second. That there is no such thing existing in the State of Arizona, in law, as a "pueblo," with right to hold property or sue and be sued, but that the alleged pueblo is simply a tribe of Indians under the tutelage of the United States, occupying the public lands, the legal title to which is in the United States.

Third. That the bill shows no such title as authorizes the institution or maintenance of any action or suit in the name of the Pueblo of Santa Rosa.

Fourth. The bill shows on its face that the United States has legal title to the lands involved, the In-

dians merely occupying the land by sufferance and that the United States is therefore a necessary party to the suit.

Fifth. The bill seeks to control the discretionary action of the defendants in matters exclusively within their jurisdiction.

The Supreme Court of the District of Columbia sustained the motion to dismiss on the ground that the suit could not be maintained. (Opinion, R. 12 to 22.)

The Court of Appeals found that the plaintiff, at the time of the cession from Mexico, was of the same legal status as the New Mexican pueblos, whose title was recognized and confirmed in fee simple by Congress; that whatever power Congress may have to control the plaintiffs' land no such power had been asserted, and that therefore the Land Department had no power to open the lands to settlement and dispose of the mineral rights therein; and accordingly remanded the case with directions to the court below to issue a mandatory injunction (R. 24–37).

ASSIGNMENT OF ERRORS.

There are numerous errors assigned in the record, which may be reduced to two.

1. Error in holding that the Pueblo of Santa Rosa was a legal entity with capacity to maintain a suit.

2. Error in remanding the case with directions to the Supreme Court to award a mandatory injunction without leave to the appellees (appellants herein) to answer and set up the facts.

In support of these assignments of error we advance the following propositions:

I. The village or Pueblo of Santa Rosa is not a legal entity and has no capacity to maintain this suit, and no authority exists anywhere save in the General Government to maintain any action for this tribe of Papago Indians.

II. In any event, the decree is erroneous in awarding a perpetual injunction and mandate without opportunity for the defendants to answer, as prescribed in Rule 32 of the Supreme Court of the District of Columbia.

ARGUMENT.

I.

The village or pueblo of Santa Rosa is not a legal entity and has no capacity to maintain this suit, and no authority exists anywhere save in the General Government to maintain any action for this tribe of Papago Indians.

1. These Indians are wards of the Nation and they and their property are under the control and protection of the Government.

Santa Rosa is "a Papago village south of the Rio Gila and west of Tucson." Handbook of American Indians, part 2, p. 460. "The inhabitants of this village and the surrounding territory are Papago Indians closely allied to the Pimas." Handbook of American Indians, p. 200.

It is unnecessary to determine what was the legal status under the Spanish or Mexican rule, so far as affects its guardianship and protection of

dependent wards of the Nation. This is well stated in *United States* v. *Sandoval*, 231 U. S. 28, 45, where in considering the status of the Pueblo Indians of New Mexico, a tribe that also lived in pueblos or small villages, it was said:

> But it is not necessary to dwell specially upon the legal status of this people under either Spanish or Mexican rule, for whether Indian communities within the limits of the United States may be subjected to its guardianship and protection as dependent wards turns upon other considerations. See *Pollard* v. *Hogan*, 3 How. 212, 225. Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a State.

It is too firmly and clearly established to admit of dispute that the tribes residing within the territorial limits of the United States are subject to their authority. *United States* v. *Rogers*, 4 How. 567, 572; *United States* v. *Kagama*, 118 U. S. 375, 384.

2. The legislative and executive branches of the Government have recognized these Indians as dependent wards of the Nation. The court will follow this determination.

An immense reservation was created for the Papago Indians in Arizona by Executive order No. 2300 of January 14, 1916, amended by the order of February 1, 1917. This reservation embraces the village of Santa Rosa and the surrounding territory. In addition to this reservation the following have from time to time been created (R. 20).

No. 1. San Xavier Reservation. By President Grant, July 1, 1874. See Executive orders relating to Indian reservations from May 14, 1855, to July 1, 1912. Washington, Government Printing Office, 1912, at page 23.

No. 2. Gila Bend Reservation. By President Arthur, December 12, 1882. (Executive orders, etc., p. 14.)

NOTE.—On June 17, 1909, President Taft "restored to the public domain" section 16 and sections 19 to 36 of lands within this reservation. (Executive orders, etc., p. 14.)

No. 3. Created by President Taft, June 16, 1911, being a part of section 7, township 21 south, range 6 east, Gila and Salt River meridian. (Executive orders, etc., p. 23.)

No. 4. Papago Reservation, created June 16, 1911, by President Taft, situate in township 17, range 5. (Executive orders, etc., p. 23.)

NOTE.—The description of Nos. 3 and 4, as given in "Executive orders," etc., were amended and modified by Executive Order No. 1655, dated December 5, 1912.

No. 5. Cockleburr, Tat-Mahmeli (or Tat-murl-ma-kot), and Chiu-Chiuschu (or Chur Chaw). Created May 28, 1912, by order of President Taft. (Executive orders, etc., p. 24.)

No. 6. Ah-Chin, etc. (Maricopa), created by order of President Taft, May 28, 1912. (Executive orders, etc., p. 24.)

No. 7. Reservation at Baboquivari, created by President Taft, December 5, 1912. (Executive order No. 1655.)

Appropriations have been made for the Papago Indians by Congress from time to time, and by the act of August 1, 1914, 38 Stat. 582, 588, money is appropriated for the improvement and sinking of wells for eight Papago Indian villages in southern Arizona, and on page 584 of the act $50,000 is appropriated for furnishing school facilities for the children of the Papago Tribe of Indians in Arizona, $5,000 of which is being spent in Santa Rosa.

In *Tiger* v. *Western Investment Company*, 221 U. S. 286, 315, it was held that it was for Congress and not for the courts to determine when the true interests of the Indian required his release from the condition of tutelage.

In *United States* v. *Holliday*, 3 Wall. 407, 419, the court said:

> In reference to all matters of this kind, it is the rule of this court to follow the executive and other political departments of the Government, whose more special duty it is to

> determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same. If they are a tribe of Indians, then, by the Constitution of the United States, they are placed, for certain purposes, within the control of the laws of Congress. This control extends, as we have already shown, to the subject of regulating the liquor traffic with them. This power residing in Congress, that body is necessarily supreme in its exercise.

These decisions were affirmed in *United States* v. *Sandoval, supra.*

3. An Indian tribe or nation has no capacity to maintain a suit.

This was settled in the early decisions of this court in *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 18, where Chief Justice Marshall, speaking for the court, said:

> An Indian tribe or nation within the United States is not a foreign State in the sense of the Constitution and can not maintain an action in the courts of the United States.

This was affirmed in *United States* v. *Kagama*, 118 U. S. 375, 379, where Mr. Justice Miller said:

> And so in the case of *The Cherokee Nation* v. *The State of Georgia*, 5 Pet. 1, 20, brought in the Supreme Court of the United States, under the declaration that the judicial power extends to suits between a State and foreign States, and giving to the Supreme Court original jurisdiction where a State is a party, it was conceded that Georgia, as a State came within the clause, but held that the Cherokees

were not a State or nation within the meaning of the Constitution, so as to be able to maintain the suit.

These decisions have never been doubted, and in order that the nations or tribes composing the Five Civilized Tribes might sue in the courts of the United States Congress passed acts expressly empowering them so to do.

4. The fee simple title to the land is immaterial.

The question of whether the ultimate fee in the land in controversy is in the Indians or in the United States is immaterial in this case, for, at most, "it is a communal title" and "the lands are public lands of the pueblo." The situation is analogous to that of the Five Civilized Tribes, *United States* v. *Sandoval*, *supra*, p. 48, and as we have seen, those tribes, as well organized as could be claimed for the Papagos, had no capacity to sue except by the authorization of Congress.

The capacity to maintain this suit, therefore, does not depend upon the legal status of the Indians or the lands under Spain or Mexico, for their status in the United States is fixed in pursuance of the long-established policy of the United States as a superior and civilized nation to exercise a fostering care and protection over all the dependent Indian communities within its borders, whether in its original territory or in territory subsequently acquired, and to control them and their lands whether held by possessory title or by a communal title in fee.

5. The Kearney Act.

The Court of Appeals held that the village of the Pueblo of Santa Rosa is a corporation under the laws of the State of Arizona with capacity to sue, and it was urged, though not decided in that court, that it was a corporation by immemorial prescription. The ultimate claim that can be asserted is that found by the Court of Appeals that the legal status of this village was that of the New Mexican pueblos. The Indians of the New Mexican pueblos were held in the *Sandoval* case to be tribal Indians and they and their property to be under the control and protection of the United States.

In *United States* v. *Pico*, 5 Wall. 536, 540, while it was held that a pueblo, once formed and officially recognized, became entitled under the laws of Mexico to the use of certain lands for its benefit and the benefit of its inhabitants, it was further said:

> The disposition of the lands assigned was subject at all times to the control of the government of the country. The pueblo of Las Flores was an Indian pueblo and over the inhabitants the Government extended a special guardianship.

As the disposition of the lands of the pueblos of Mexico was subject to the control of the Mexican government and, since the cession from Mexico, subject to the control of the United States, no capacity to alienate or to sue or be sued for such lands existed in the pueblo. If the pueblos of New Mexico

have any capacity to sue, which is not necessary to be determined in this case, it is not by virtue of their legal status under Spanish and Mexican rule, but solely by reason of the act passed by the territorial legislature of New Mexico while General Kearney was military governor, and called in the record "the Kearney Act." The Laws of New Mexico, 1851–52, p. 418. For convenience, this is printed as a footnote.[1]

This act incorporates the inhabitants within the Territory of New Mexico "known by the name of the Pueblo Indians, and living in towns or villages." The Pueblo Indians are a distinct tribe of Indians, and this people in history "comprise the Tanoan, Keresan (Queres), and Zunian linguistic families of New Mexico, and the Hopi of Shoshonean affinity, in northeast Arizona." Handbook of American Indians, part 2, page 318.

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[1] An Act Entitled an act to enable Pueblo Indians to bring and defend actions.

Be it enacted by the General Assembly of the Territory of New Mexico:

Section 1. That the inhabitants within the Territory of New Mexico, known by the name of the Pueblo Indians, and living in towns or villages built on lands granted to such Indians by the laws of Spain or Mexico, and conceding to such inhabitants certain lands and privileges, to be used for the common benefit, are severally hereby created and constituted bodies politic and corporate, and shall be known in law by the name of the "Pueblo de ———," (naming it) and by that name they and their successors shall have perpetual succession; sue and be sued, plead and be impleaded, bring and defend in any court of law or equity, all such actions, pleas, and matters whatsoever, proper to recover, protect, reclaim, demand, or assert the right of such inhabitants, or any individual thereof, to any lands, tenements, or hereditaments, possessed, occupied, or claimed contrary to law by any person whatsoever, and to bring and defend all such actions, and to resist any encroachment, claim, or trespass made upon such lands, tenements, to hereditaments belonging to said inhabitants or to any individual.

Approved December, 1847.

From this publication it also appears that these people first became known to civilized people in 1539, and are called Pueblos on account of the peculiar style of compact permanent settlements as distinguished from temporary camps or scattered rancherias of less substantial houses. It is contended that in the act of the New Mexico Legislature there was the intent to incorporate all of the village Indians of New Mexico regardless of their tribal affiliations. This construction can not be maintained from the language of the statute itself, for if it had been the purpose of the legislature of New Mexico to incorporate all the village Indians of the Territory it would have left out "known by the name of the Pueblo Indians," and provided for the incorporation of all the Indian inhabitants of the Territory residing and living in towns or villages. The insertion of the tribal name of the Indians was for the purpose, of course, of limiting the effect of the law to the Indians known tribally as Pueblo. This statute can not be extended to the Papago villages or towns in Arizona. They had and have a distinct tribal name and are not ethnologically, historically, or legally known as Pueblo Indians, but as Papagos. Congress recognized the distinction between the Pueblos of New Mexico and the other Indians of New Mexico and Arizona in the enabling acts of those two States. (36 Stat. 557, 558.) Section 2 of this act directs that the constitutional convention of New Mexico shall provide by ordinance irrevocable, first, among other things, for prohibiting the sale of intoxicating liquors

to Indians and the introduction of liquors to Indian country, "which term shall also include all lands now owned or occupied by the Pueblo Indians of New Mexico"; and in the 8th clause, prohibiting the sale of liquor on lands within an Indian reservation for twenty-five years after the same shall be disposed of, again declares that the term "Indian country" shall include the Pueblo Indians of New Mexico and the lands now owned or occupied by them. There is no such provision in the enabling act of Arizona. Congress recognized at that time that the Pueblos of New Mexico had a different status from the Papagos living in villages in Arizona.

From the foregoing, it is clear that the Papago Indians residing in small villages in Arizona are not legal entities with corporate capacity to sue and be sued, but are Indians under the care and protection of the General Government.

II.

In any event, the decree is erroneous in awarding a perpetual injunction and mandate without opportunity for the defendants to answer.

The defendants herein desire to show that the records of the General Land Office disclose that the President of the United States has included the lands in controversy within the reservation for the Papago Indians. This controverts the allegation in the bill that the Secretary of the Interior and the Commissioner of the General Land Office are patenting and

proposing to patent these lands to third parties, and accentuates the necessity of permitting the Secretary of the Interior and the Commissioner of the General Land Office, in the event the court should by any possibility hold that the Indians of the village of Santa Rosa have capacity to maintain this suit, to answer the allegations of the bill and set up the facts with regard to their efforts to protect and care for these dependent wards of the Government.

The whole case, involving the disposal of 720 square miles, or more than 460,000 acres of land, was finally disposed of, and permanent injunction granted, merely upon bill and motion to dismiss, without permitting defendants to answer on the merits and to deny, as they would if opportunity were given, every material allegation of fact in the bill.

It is submitted that this premature foreclosure of the defense violates elementary principles of equitable procedure, constitutes a dangerous precedent and involves grave injustice to defendants. Only through full disclosure of the defense by answer and proofs could the court obtain the complete understanding of the case necessary to a just and intelligent adjudication. If the motion to dismiss had been overruled, instead of sustained in the trial court, it is unquestionable that defendants would have been allowed to develop their defense by answer and proof. They had a right within five days to file an answer. Why, then, should they be in a worse position in the appellate court simply because the trial court

decided in their favor? It may be that a discretion rests in appellate courts, upon overruling a motion to dismiss, to direct a decree or to remand for further proceedings, but the former alternative can only be adopted where under no state of facts could the defendants prevail in whole or in part. It is *prima facie* inconsistent with the right of defendants to a full hearing and as well with the principle that the function of a demurrer, or motion to dismiss, is to demand the judgment of the court whether the defendant shall be compelled to answer the bill. It is submitted that in the case at bar the Court of Appeals in reversing should have remanded the case for answer and further proceedings.

The new Equity Rule No. 29, after abolishing demurrers and pleas and permitting defenses in point of law arising upon the face of the bill to be made by motion to dismiss or in the answer, provides:

> If the defendant move to dismiss the bill or any part thereof, the motion may be set down for hearing by either party upon five days' notice, and, if it be denied, answer shall be filed within five days thereafter or a decree *pro confesso* entered.

Equity Rule No. 32 of the Supreme Court of the District of Columbia is practically identical with Federal Equity Rule No. 29. The time-honored principle is thus laid down that a defendant should have opportunity to first test the legal sufficiency of the bill by motion to dismiss, and, if unsuccessful, should still have opportunity to answer. In the recent case of

United States v. *Mackey*, 216 Fed. 126, a ruling in point was made in the appellate court. Here the United States filed a bill to quiet title to certain Indian lands. Demurrers were filed, treated by the trial court as motions to dismiss under the new Equity Rules, and sustained, whereupon the United States appealed from the decree dismissing the bill. In reversing this decision the Court of Appeals says (p. 127):

> We may properly say by way of premise that it would be unfortunate if the court should be compelled to decide the grave and important questions arising in this litigation, upon a mere motion to dismiss the bill and without the full presentation of the facts by way of lawful evidence.

And again (p. 128):

> The United States has never at any time had an opportunity to show by evidence that the allegations contained in paragraph 3 of the bill were true. On the contrary, they have been turned out of court by a finding that the Creek Nation had no right or interest in the land, and this not upon any showing of the United States, but upon a case gathered from the world at large.

The decision was as follows (p. 129):

> We think we can not do otherwise than reverse the decree of dismissal and remand the case with instructions to the trial court to deny the motions to dismiss *and allow the defendants to answer if they shall be so advised.* [Italics ours.]

The long-established practice of this court in like situations sustains our contention. *Davis* v. *Tileston*, 6 How. 114, was a bill in equity to enjoin a judgment. Defendants demurred to the bill, the demurrer was sustained, and the bill dismissed. An answer had also been filed a few days previous to the judgment, but for some reason was not considered, and the only question before this court was whether the judgment dismissing the bill on the demurrer was correct. The court held that it was not correct, but said (p. 118):

> But as the answer in the present decision must be put out of the question, and as the demurrer admits all facts duly alleged in the bill, the plaintiff seems entitled to judgment on these admissions, though, to prevent injustice by oversight or mistake, we shall take care to render such an opinion that the respondents can be enabled in the court below to avoid suffering, if they possess a real and sufficient defense to the bill.

The decision was (p. 121):

> The judgment below in favor of the demurrer is therefore reversed. But in order that justice may be done between these parties on the answer and any evidence either of them may wish to file, final judgment is not rendered here for the plaintiff, but the case is remanded, in order that leave may be given to the respondents to withdraw their demurrer, and the cause to be heard on the bill and answer, if no evidence is desired to be put in;

or on these and such evidence as the parties may wish to offer.

The court will note that the situation above presented, in so far as bill and motion to dismiss are concerned, is identical with the status of this case when it reached the Court of Appeals. We earnestly urge that the decision of that court was erroneous exactly in so far as it differed from the decision just quoted.

See also:

Erwin v. *Parham*, 53 U. S. 196, 206.
Clearwater v. *Meredith*, 62 U. S. 489, 493.
County of Dallas v. *Mackenzie*, 94 U. S. 660, 664.
Virginia v. *West Virginia*, 206 U. S. 290.

If this suit can be maintained and becomes final upon the pleadings, it will not only affect the right and title of the entire Papago Tribe but the Pimas, Maricopas, Mojaves, and perhaps other Indians, covering a vast territory in the State of Arizona and elsewhere.

CONCLUSION.

The judgment of the Court of Appeals of the District of Columbia is erroneous and should be reversed, and the judgment of the Supreme Court of the District dismissing the bill should be affirmed.

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Attorney.

JANUARY, 1919.

○

FILED
JAN 26 1916
JAMES D. MAHER,
Clerk.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

[redacted]

October Term, 1915.

No. 197.

Franklin Knight Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office,

Appellants,

vs.

The Pueblo of Santa Rosa,

Appellee.

BRIEF OF APPELLEE.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1917.

No. 513.

October Term, 1918.

No. 197.

Franklin Knight Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office,

Appellants.

vs.

The Pueblo of Santa Rosa,

Appellee.

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

This is an injunction suit brought by the appellee to enjoin illegal encroachment upon its land. The questions involved are whether the plaintiff can sue as a juridical entity in this

Court and whether the plaintiff has a standing in Court as a landowner and whether it is in any way barred from asserting its rights.

These questions are raised by the appellant's motion to dismiss the complaint.

The Locality.

Papagueria is a so-called desert country, without rivers or transportation, lying along the border of Mexico. It is the last corner of our land, and the land and its inhabitants have been practically forgotten by our people and our government until within a few years.

Some of the land is public domain, but large parts are owned and occupied, and have been since Aztec times, by about twenty Pueblos of civilized Indians.

The plaintiff is one of those Pueblos, which to save itself and its Indians from illegal encroachment of private individuals and government officers—in these days when all the cheap public land has gone—brings this injunction suit.

The Pueblo of Santa Rosa and the Papago Pueblo Indians.

The character of the pueblo and the Indians is fully set out in the bill of complaint, and these allegations are conclusive for present purposes. The complaint alleges:

"I. The plaintiff, the Pueblo of Santa "Rosa, is and from time immemorial has "been a town known by the common name "of Pueblo of Santa Rosa and consisting "of civilized, sedentary, agricultural and "pastural inhabitants who are and from "time immemorial have been pueblo In-"dians known by that name and living in "permanent houses of substantial construc-"tion in a village, of fixed and permanent "location, built upon lands within the pres-"ent County of Pima, State of Arizona, "granted and conceded to said Indian "pueblo by the laws and customs of the "Indians antedating the Spanish discovery "of America and also by the laws of Spain "and Mexico, said lands being within the "territory ceded to the United States by "the Gadsden Treaty, and to whom, as "constituting said pueblo, said laws and "customs conceded certain privileges and "lands, to be used for the common benefit "of the town and its inhabitants.

"The inhabitants of said pueblo live "and from time immemorial have continu-"ously lived together in communal life in "said town community known as the Pueblo "of Santa Rosa. They govern and from "time immemorial have governed them-"selves and their town community in ac-"cordance with definite laws and customs "having the force of law and in their "public and private affairs they obey and "from time immemorial have obeyed said "laws and customs and the lawful orders "of officials elected by them in accordance "with said laws and customs. They at reg-"ular intervals assemble and from time im-"memorial have assembled together in com-"mon council composed of the adult male

"inhabitants of the town and at said coun-
"cils have resolved all matters concerning
"the town community and its inhabitants
"by rules and decisions having the force
"of law. They have from time immemorial
"maintained a high degree of civilization as
"compared with the wild or savage Indian
"tribes and have been peaceable except
"when attacked by savage tribes and have
"always defeated the attacks of such sav-
"age tribes and have never made war on
"white settlers or resisted established gov-
"ernment and have cultivated and utilized
"the lands of their town community with
"much intelligence, skill and industry.

"The inhabitants of said pueblo were at
"the time of the Gadsden Treaty citizens of
"Mexico with large civil and political rights,
"and said inhabitants are now citizens of
"the United States and of the State of
"Arizona and reside in said pueblo of Santa
"Rosa, in said County of Pima and State
"of Arizona."

"The laws and customs of the Indians
"and also the laws of Spain and of Mexico
"at all times conceded to the plaintiff, and
"the plaintiff claims and exercises, and
"from time immemorial has claimed and
"exercised, (1) the right to have a common
"name, to wit, the Pueblo of Santa Rosa,
"and (2) the right and power to take, hold,
"manage, control, and dispose of real and
"personal property, including the land upon
"which its said village is situated and the
"surrounding lands, and (3) the right and
"power to contract and otherwise act as an
"entity by resolutions passed in common
"councils composed of its adult male in-
"habitants, and through its officers and
"representatives, in all matters concerning

"its interests, property and affairs, and (4) "the right and power to have perpetual suc- "cession, and (5) the right and power to "sue and be sued as an entity and to ap- "pear and act as such before courts and "governmental authorities, and (6) the "right and power to maintain a permanent "town organization and government, and "to make, at common councils of its inhab- "itants, rules and laws binding upon the "pueblo and its inhabitants, and to be con- "trolled and managed by its inhabitants act- "ing together according to law and accord- "ing to rules so made, and to elect and keep "in office captains, alcaldes and other town "officers exercising much power and juris- "diction over said pueblo and its property "and inhabitants for their common benefit "and for the maintenance of order, the "preservation of its property, the promotion "of its interests and the conduct of its "affairs."

"By reason of the facts above mentioned "the plaintiff is and from time immemorial "has been, under the laws of Spain and "Mexico and of the United States, an entity "in fact and in law and a juridical person "entitled to sue as such."

"The plaintiff is and from time imme- "morial has been an Indian town commu- "nity and one of many pueblo Indian town "communities situated within the present "and former territory of Mexico, which in "character, organization and activity have "been and are similar to the plaintiff and "which existed as pueblo Indian towns at "the time of the Spanish discovery of "America and at all times since and which "are and at all times have been known and

"designated in Spanish as pueblos de in-
"dios or Indian pueblos. The plaintiff
"brings this suit in its own right."

"III. From time immemorial and since
"before the first explorations of the Spanish
"discoverers and for more than three hun-
"dred years prior to the time of bringing
"this action, the Pueblo of Santa Rosa has
"owned and actually possessed and occu-
"pied all of that certain definite tract or
"parcel of land situate in Pima County in
"the State of Arizona, which land includes
"the village where the inhabitants of said
"pueblo reside and is bounded and described
"as follows: Commencing at a point or
"place known as Kabitque or Mountain
"Logia plain; thence running south a dis-
"tance of twenty-four miles more or less
"to a point or place known as Okama or
"Okomo; thence running west a distance of
"twenty-four miles more or less to a point
"or place known as Mescalero; thence run-
"ning north a distance of thirty miles more
"or less to a point or place, known as
"Sierra Cabeza; thence running east a dis-
"tance of thirty miles or less to the point or
"place of beginning; and containing an area
"of seven hundred and twenty square miles
"more or less. All of said tract of land has
"continuously during all of said period been
"exclusively and actually occupied and pos-
"sessed by said pueblo of Santa Rosa under
"open and notorious claim of right and
"absolute ownership, and said pueblo and its
"inhabitants have during all of this period
"occupied and utilized all of said land for
"the purposes of agriculture and grazing,
"and have resided thereupon. The actual
"boundaries above set forth of said land

"have from time immemorial been definitely "fixed, known and recognized, and are "marked by definite and recognized natural "monuments, and the ownership, possession, "use and occupation of said land by said "pueblo and its inhabitants, for the pur- "poses of agriculture and of raising and "grazing cattle, of building dwellings and "other permanent structures and for all "other purposes, have always been coter- "minus with said boundaries."

"IV. Spain during all the period of its "sovereignty over the territory including "the land herein described at all times rec- "ognized and in no instance disputed the "ownership of said lands by the Pueblo of "Santa Rosa and by repeated royal orders "and decrees, recognized the Papago In- "dians and the inhabitants of said pueblo as "free vassals of the Spanish Crown, en- "titled to all the protection in their proper- "rights which was accorded to Spanish "subjects, and recognized and confirmed "the ownership of plaintiff in said lands. "After the establishment of its sovereignty, "Mexico recognized and never disputed the "ownership of the land herein described "by the Pueblo of Santa Rosa, and during "all of the period of Mexican sovereignty "the Papago Indians and the inhabitants of "the Pueblo of Santa Rosa were Mexican "citizens and entitled to and actually en- "joyed property rights and all other rights "identical with those of all other citizens "of Mexico. Under the laws of Spain and "Mexico the distinction was clearly recog- "nized and established between savage In- "dians or indios barbaros, and peaceable "Indians living in fixed abodes in perma-

"nent communities and subsisting by agri-
"culture and grazing, known as indios de
"los pueblos or pueblo Indians."

"VI. At the time of the acquisition from
"Mexico by the United States of sovereignty
"over the territory comprising said land
"and at the time of the making of said
"treaties the said pueblo of Santa Rosa was
"the absolute owner with complete, perfect
"and undefeasible title to the land herein
"described against all governments and in-
"dividuals and all the world, except such
"rights as pertained to the inhabitants of
"said pueblo as members thereof, and since
"said change of sovereignty this perfect
"title and ownership has continued to exist
"and now exists. The inhabitants of said
"pueblo of Santa Rosa ever since said
"change of sovereignty have been and now
"are actually in possession, use and occupa-
"tion of all of said lands except in so far
"as recently they have been wrongfully dis-
"turbed in said use and occupation by tres-
"passers without color of right or title as
"hereinafter set forth. By the terms of the
"treaties hereinabove mentioned, the owner-
"ship of its lands by said pueblo of Santa
"Rosa was forever guaranteed and secured
"to it by the United States." [Transcript, folios 4 to 7.]

But we need not rely on the appellants' admission; the character of the Papago pueblos is abundantly established by public documents and books of authority.

The History and Character of the Papago Pueblo Indians and Their Pueblos as Shown by the Authorities.

In 1915, Hon. Cato Sells, the Indian Commissioner, in his address at the Lake Mohonk Conference (printed in the 33rd Annual Report of the Lake Mohonk Conference) said:

> "I presume you know something of the Papagos.—I have recently visited them. They live in Southern Arizona on the border of Mexico in the driest desert of the United States. *It has been their home for more than two hundred years.* No branch of the Caucasian race could survive under the conditions existing there. The Papagos have successfully contended against tremendous obstacles. The possession of their lands is now seriously threatened by the invasion of Mexican cattlemen and others. The Papagos are sending up a Macedonian cry for help and we should promptly go to their rescue. The Papago Indians are in all respects deserving of our best efforts. They have been industrious and self-reliant. It is their proud boast that no Papago Indian has ever shed the blood of a white man. The citizens of Arizona are very friendly to them, and this is especially true of Governor Hunt. Nothing affecting any tribe of Indians has aroused my sympathy more, and I want to assure you that the best efforts of which I am capable will be exerted to permanently establish these Indians in the Papago country."

In 1912, Carl Lumholtz, a keen and experienced observer, in his "New Trails in Mex-

ico" the last and best account of the southwestern country, says:

> "It has been the good fortune of the Papagos to live in a country which the white man has not as yet found it profitable to exploit by cattle raising or still less by dry farming. Therefore they have so far been left alone in their native country * * *. The Papagos are above medium height, rather dark in color, and of splendid physique. The women are inclined to be stout. They are a peaceful but at the same time courageous people and show much intelligence. They are hospitable, as becomes a desert people. * * * The Papagos are by no means badly off as a rule and they manage to make a good living where, so far, the white man's efforts have failed. Their herds adapting themselves to the arid conditions, are increasing and making the Indians prosperous and comfortable" (pp. 26 to 28).

In 1913, the following proofs were made before a sub-committee of Congress, either by testimony of Mr. Schenck, for many years connected with Indian affairs and now or recently Superintendent of Irrigation for the Indian Bureau or from formal statements and reports prepared by the Indian Bureau and read into the record. See public document published in 1913 under the title "Indian Appropriation Bill: Hearings before a Sub-Committee of the Committee on Indian Affairs," etc.

"The (Papago) Indians are very industrious farmers so far as their ability will permit", (p. 52). "All the Papagos are naturally industrious", (p. 53). "They are an industrious people and have done remarkably well under adverse conditions", (p. 303). They subsist "on the stock that they raise and they have sometimes small primitive systems of irrigation and do farming. * * * They have developed a good many varieties of beans. * * * This improvement in plant life shows their interest in agriculture. The University of Arizona is studying their problems, and thinks that we can learn something about dry farming from the Indians. * * * They have their own houses. * * * They are built sometimes of adobe brick but more frequently they use the brush mats plastered on both sides, quite sanitary houses. * * * Usually the children are clean and as well clothed as you can expect under these conditions" (p. 305). "They are a bright and energetic people for Indians. Their principal source of revenue is that of stock raising. * * * These Indians have had practically no aid from the government and have been a peaceful and inoffensive tribe at all times and are almost wholly self-supporting at present" (pp. 322-323).

In 1872, General Francis A. Walker, Commissioner of Indian Affairs, gave an official description of the Papagos, which the Secretary of the Interior approved and forwarded to the President. He said (Exec. Docts., 3d Sess., 42d Congress, Report of Sec'y of Int., p. 445):

*"These Indians, numbering about 5,000, are of the same class, in some respects, as the pueblos of New Mexico, living in villages, cultivating the soil, and raising stock for a support. * * * These Indians have no treaty relations with the United States and receive no assistance from the government."*

In 1869, J. Ross Browne, in "Adventures in the Apache Country" (New York, Harper & Bros.,) said (page 110 ff.):

> "In 1860, they sold 400,000 pounds of wheat—all the mail company would purchase. They had more, and furnished the government and private teamsters all that was necessary for transportation from Fort Yuma to Tucson. * * * In 1862, they sold to the government over a million pounds of wheat, included in which was a portion of the previous year's crop, returned to them by the Texans. They furnished pinole, chickens, green peas, green corn, pumpkins, and melons for the entire California column, supporting nearly a thousand men for many months * * *.
>
> "As far back as our knowledge of the Papagos extends they have been a peaceable, industrious, and friendly race. They live here, as they lived two centuries ago, by cultivating the low grounds in the vicinity, which they make wonderfully productive by a system of irrigation."

In 1869, William A. Bell, in "New Tracks in North America" (London, Chapman & Hall) p. 159, said:

> "As a race they (the Papagos) are the finest specimens of men, physically, I have ever seen. * * * The most interesting point * * * is their mode of life * * *. They own flocks and herds in considerable quantities, and they keep large droves of horses, or rather ponies. * * * They have become the greatest traders, and the most industrious people to be found in the country."

In 1868, Col. Roger Jones, Assistant Inspector General, reported on the Indians in Arizona and Southern California as follows. (See report of Commissioner of Indian Affairs, 1869, at page 220).

> "They are industrious, support themselves by cultivation, and manufacture of mats and pottery, in which they are well skilled. * * *
>
> *"Of late years this industrious tribe has been entirely ignored by the Indian Department, and it is not known that any reservation has been designated for them."*

In 1865, Agent M. C. Davidson said, at page 131 of the Report on Indian Affairs for 1865 (Report of Sec'y of Int., 1865, p. 299, Exec. Doct. 39th Congress, Vol. 2):

> "The Papagos were originally from the same stock as the Pimos and Maricopas. These tribes speak a common language, which is conceded to be the ancient Aztec tongue. * * * The Papagos represent that portion of the original people who, while occupying their ancient seats * * * embraced the Christian faith. * * * The

Papagos are probably descended from the most ancient occupants of the continent of whom we have any knowledge; their traditions reach back to a high antiquity, though obscure as to dates. Their unwritten chronicles embrace the epochs of the creation of man, the occurrence of a universal deluge, and the coming of the Spaniards. Until the last named event, their fathers were governed and guided by the great Montezuma, who is clothed according to their dim traditions, with the attributes of a demigod, as well as those of a law-giver, and terrestial king. The status of the Papagos with respect to the soil ought to be determined in a way that no injustice will be done to them. *The Mexican laws, based upon the laws of the Indians promulgated by the Kings of Spain, recognized the Indians as subjects or citizens, and in most cases confirmed to them, wherever they resided in fixed communities, the titles to the lands where they lived. The Spaniards never made treaties with the Indians, nor extinguished the titles to the land,* nor did they in any way recognize them as independent nations. Those who now, by the transfer of the political sovereignty of the country, find themselves upon American soil, and surrounded by Americans, look for at least a measure of recognition of their rights equal to that which they enjoyed under the despotic government of Spain.

"In my opinion, we must regard them as American citizens, and under certain conditions entitled to all their privileges.

"If we inquire into their characteristics as a people, we shall find that they are agriculturists to an extent sufficient to sup-

ply their simple wants. At times they have produced a surplus for their less fortunate white neighbors. As warriors and soldiers, they have for ages maintained their position against the hostile Apaches. As Christians, they have for two hundred years remained the humble but faithful disciples of the church. The conduct of their maidens, wives, and mothers has always been beyond reproach."

The report names the Papago pueblos, including Santa Rosa.

In 1863, the first Superintendent of Indians for Arizona, Charles D. Poston (known as the Father of Arizona) filed with the Secretary of the Interior, a report on Indian affairs in that section, speaking from his personal knowledge. Concerning the Papagos, he said:

"The Papagos inhabit that triangular space of arid land bounded by the Santa Cruz, Gila and Colorado Rivers, and the Mexican boundary line. The first and principal village is at San Xavier del Bac, a church erected by the Jesuits in 1698, and here they have lived and planted and watched their flocks and herds ever since. * * * They raise corn, wheat, barley, beans, peas, melons and pumpkins, and are expert in the manufacture of pottery and willow ware. In harvest time they spread all over the country as reapers and gleaners, returning with their wages of grain for winter. * * * They have horses, cattle, sheep, poultry and great numbers of dogs. As these Indians were found in possession

of the soil they cultivate and have maintained themselves there continuously ever since, it would seem equitable that their rights should be recognized by the government of the United States. * * * The Papagos within our jurisdiction live in 18 different villages and are estimated as follows:

San Xavier del Bac.....	500
Mesquit	500
Fresnal	250
Poso Blanca.....	300
Cumero	500
Alcade	250
Sonoita	500
Cahuabia	350
Chuba	250
Tecotota	500
Mariz	250
Sou Saida.....	250
Santa Rosa.....	400
Periqua	400
Cojota	500
Quejotoa	500
Poso Verde.....	350
Quoto Vaquita.....	250
	6,800"

Mr. Poston's Report for 1865 (Exec. Docts. 2d. Sess., 38th Congress, Vol. V, Report of Sec'y of Int., p. 296), says:

> *"The early Spanish explorer found the Papagos here in 1540, and ruined houses of grand proportions attest their occupancy for thousands of years before the Spaniards came."*

In 1856, the Indian Commissioner reported as follows, (Report of Sec'y of Int.—Senate Doc. 3d. Sess. 34th Cong., Vol. 2):

> "The pueblo Indians maintain their character as peaceable, industrious communities. Some of them have lost the title-papers for the grants of land obtained by them from Spain and Mexico. In such cases their agent has taken testimony in their behalf. They deserve the fostering care of the government, and Congress will no doubt confirm their titles. *About five thousand Indians are embraced within the Gadsden purchase. They are mostly Pueblos and reside in six different villages.* They have houses and flocks, and raise wheat and other products of the soil" (p. 566).

In 1856, the Governor of New Mexico reported on the Pueblo Indians within the territory acquired by the Gadsden purchase and now included in Arizona, being the Papago pueblos. He says (Report of Commissioner of Indian Affairs, 1856, p. 183):

> "A large portion of this accession to our Indian population consists of pueblos, situated near Tucson. * * * They reside in permanent villages, have comfortable houses built of adobes, have flocks and herds around them and rely upon the cultivation of the soil for subsistence—raising wheat, corn, cotton, and other vegetables. They are divided into six pueblos, or villages, but whether or not they hold their lands under grants from the former governments of their country, I am not informed;

but presume they do, as they have been permanently settled for a great number of years."

In 1855, Major Emory, as United States Boundary Commissioner, was examining and surveying the territory of the Gadsden purchase (including the territory now in question) before it came into the actual possession of the United States and his account of the promises made officially by him to the Indians is interesting and important, for it shows that in taking over this land the United States government knew that the Papago pueblos were land owners and not paupers. Major Emory calls the Indians "Pimas," which is a name often applied to the Papagos, but there is no doubt from the names and the context that the Papagos are referred to. Major Emory said (Mexican Boundary Survey, Vol. I, Part I, p. 94.—H. R. Executive Document No. 135, 34th Congress, First Session, 1857):

> "The most considerable and interesting settlement in the new territory is composed of a confederacy of semi-civilized Indians, the Pimos, and Coco Maricopas. * * * I became acquainted with these people in 1846, and in another work eulogized *their advanced state of civilization, their proficiency in agriculture and the art of war, and their morality.* While at Los Nogales * * * a delegation consisting of the chiefs and head men, visited my camp nearly 200

miles distant from their homes, to consult as to the effect upon them and their interests of the Treaty with Mexico, by which they were transferred to the jurisdiction of the United States. I give below a copy of the statement made at the meeting, where it will be seen that I said all in my power to silence their apprehensions. *They have undoubtedly a just claim to their lands,* and if dispossessed will make a war on the frontier of a very serious character.

"I hope the subject will soon attract the attention of Congress as it has that of the Executive, and that some legislation will be effected securing these people in their rights. They have always been kind and hospitable to emigrants passing from the old United States to California, supplying them freely and at moderate prices, with wheat, corn, melons and cotton blankets of their own manufacture."

"Camp at Los Nogales, June 29, 1855. Capt. Antonio Azul, Head Chief of the Pimos; Capt. Francisco Luke, Coco Maricopa Chief; Capt. Malia, Coco Maricopa Chief; Capt. Shalan, a Chief of Gila Pimos; Capt. Ojo de Burro, War Chief of Pimos; Capt. La Baca de Queja, a Chief of Gila Pimos; Capt. Jose Victoriano Lucas, Head Chief of San Xavier Pimos; Capt. Jose Antonio, Chief of San Xavier Pimos, have this day visited my camp for the purpose of ascertaining in what manner the cession of the territory under the treaty with Mexico, will affect their rights and interests. I have informed them that, by the terms of the treaty, all the rights that they possessed under Mexico *are guaranteed to them by the United States;* a title to lands

that was good under the Mexican Government is good under the United States Government. I informed them that in the course of five or ten months, perhaps sooner, the authorities of the United States would come into the ceded territory and relieve the Mexican authorities; until that time they must obey the Mexican authorities, and co-operate with them, as they have done heretofore, in defending this territory against the savage Apaches. I have examined the testimonials given by numerous American emigrants to Azul and his captains bearing testimony to the kindness and hospitality of himself, and the Pimos and Coco Maricopa Indians generally. I can myself bear testimony to the truth of these statements. I therefore call upon all good American citizens to respect the authority of Azul and his chiefs.

(Signed) W. H. EMORY,
U. S. Commissioner,
Major, U. S. A."

In 1762, the Jesuits had twenty-nine missions, "consisting of seventy-three Indian pueblos," of which several were located in the province which afterwards became Arizona and later the Franciscan "priests visited Tubac, Tucson and other pueblos of the Papagos at stated times." (See "Soldiers of the Cross—Notes on the Ecclesiastical History of New Mexico, Arizona and Colorado" (1898), by J. B. Salpointe, formerly Arch-Bishop of Santa Fe, pp. 134 and 181.)

In 1540-42, Viceroy Mendozo ordered an expedition to visit northwestern Mexico, and Padre Castenader who accompanied the expedition shows that the Papagos at that time occupied the same territory in the same way as at present. He says:

> "It is sufficient to say that the people of the Gila River are agricultural, cultivating maize, beans, pumpkins (melons), and cotton. They depend exclusively upon agriculture for their subsistence, dwelling in villages built of mud (adobe)."

The Pueblo of Santa Rosa, According to Authorities.

This pueblo has from time immemorial occupied the valley of Santa Rosa and it is frequently mentioned in the books and records. Thus the United States Surveyor General's report for 1861 includes Santa Rosa in the list of pueblos as "one of the Papago pueblos"; and in his testimony before the Congressional Committee in 1913, Mr. Schenck, Superintendent of Irrigation for the Indian Bureau, mentions Santa Rosa as one of the places "where the villages have been established for a long time and where it is known that the Indians constantly make their homes" and as being one of the largest of the villages (see Public Document entitled "Indian Appropriation Bill: Hearings before a Sub-Committee of the Committee on Indian Affairs," etc., 1913.)

Santa Rosa is described in the "Hand Book of American Indians," Part 2, page 460, and it is shown under that name on the various maps with its subordinate villages and wells.

Lumholtz in his "New Trails in Mexico" (pp. 90, 109) describes the village, giving its native name and saying that it is the largest summer rancheria of the Papago tribe and that the houses are scattered over an area of nearly two miles square and that the Papagos in this village are less spoiled by contact with civilization than in any other part of their country.

The territory in question is considered sacred. The "Hand Book of American Indians," Part 2, page 460, says that the adjacent mountain of Santa Rosa is "a sacred place in Pima and Papago mythology"; and in his report to the Commissioner of Indian Affairs in 1865, Special Agent Davidson wrote as follows, showing clearly the ancient and permanent character of the village:

> "The sacred mountain and village of Santa Rosa is a mecca to the Papagos. According to the ancient legend, after the Great Spirit had formed the earth and all living things, excepting man, he came down to visit his work. Alighting near Santa Rosa, he made a hole in the ground and reascended to the skies taking with him a piece of clay, being the same material with which the Indians to this day make their pottery. From the heavens he dropped

> the clay into the hole already prepared, and from that orifice sprung forth Montezuma, who assisted in the creation of the Papagos and all other Indian races in order." (See Report of Commissioner of Indian Affairs, Executive Document 1248, 1865, to 1866, Vol. 2, p. 299, 1st Session, 39th Congress.)

The valley of Santa Rosa and the pueblo land in that valley are desert lands; Mr. Schenck in his report above cited mentions Santa Rosa as one of the eight villages that need water, and it is natural that the largest Papago pueblo should occupy and use for its herds, summer and winter, a territory, amounting as shown by the bill of complaint, to about 400,000 acres. This is not a large acreage for desert land for a large pueblo. The New Mexican pueblo land is vastly more fertile, and yet the government created for the Zuni pueblo in New Mexico a reservation which with the pueblo lands gives the Zuni pueblo the use of more than 215,000 acres; and in the case of the Arizona Hopis, desert pueblo Indians whose conditions are similar to the Papagos, the government has set aside 2,472,320 acres for the use of only 2,300 Hopis. (See "Hand Book of American Indians," Part 2, p. 374; Part 1, p. 560.)

The Legal Status of the Papago Indians and Their Pueblos.

Under the Spanish and Mexican laws and at the time of the cession the pueblos of the Papagos (as well as all Indian pueblos) were recognized as juridical entities; they were fully organized to conduct their own affairs and to bear their responsibility toward the public; they were regulated and privileged by law, and they had power by law to appear in court and to hold property; and the laws granted and confirmed to them the lands which they occupied and the right to protect those lands in court. Each pueblo held its title as a legal entity.

The Indians themselves were free vassals of the King and had large personal rights and the right to sue.

Under the Mexican rule the Indians were made citizens and put upon an absolute equality with the Spaniards, and their pueblos and the pueblo property were free from restrictions.

All this appears from the following quotations which are taken for the most part from the famous *"Laws of the Indies"* which were begun by decree of Charles V. in 1543 and extended by subsequent decrees of the Spanish Kings until they constituted one of the best codes of law ever promulgated. This code of laws comprehended all the laws of Spain with regard to Spanish America and it determined the per-

sonal rights and property rights and political rights of both Spaniards and Indians in America. We translate and quote from the last edition of the "Laws of the Indies" which was published in Madrid in 1889 but there has been no material change in the text for one hundred years. The keynote of this benificent code was struck by the original decree as published in 1543, showing that the Indians were made free and that their laws and customs were continued and that they were allowed to sue.

We translate from a facsimile of the original published in London in 1893:

> "And because our chief intention and will has always been and is the preservation and increase of the Indians and that they be instructed and taught in the matters of our holy Catholic faith and be well treated *as free persons and our vassals as they are*, etc.
>
> "The audiencias (courts) must not allow that in suits between Indians or in ordinary proceedings at law, any dilatory measures, as is wont to happen, through the malice of some advocate and solicitor, but *that they be determined by strictly observing their customs*, unless they be manifestly unjust and that the said courts take care that this be observed by the other, inferior judges."

Laws of Indies—Book IV, Title 12, Law 14 (1578):

> "Because we have wholly succeeded to the lordship of the Indies and because the

public lands not granted away by the kings, our predecessors, or by us in our opinion belong to our patrimony and royal crown, it is suitable that all the land which is held in possession without just and true titles shall be restored to us as it belongs to us so that, reserving before everything that which to us or our viceroys, courts, or governors may appear necessary for plazas, commons, public lands, pastures and territory of the inhabited villages and towns in view of their present condition as well as of the future and their possible expansion, *and granting to the Indians that of which they may reasonably have need for working the land and making their crops and for their education, confirming them in that which they now have and giving to them in addition that which is necessary*, all the rest of the lands may remain and be free and unencumbered to be disposed of according to our will. Wherefore we order and direct the viceroys and presidents of the pretorial courts that when it appears proper to them they shall announce a suitable limit of time in order that those in possession may exhibit before them and the officers of their courts which may name the titles of the lands, plantations, farms, stock farms, *protecting those who are in possession with good title and guaranties or with just prescription* and they shall return and restore to us the remaining land to be disposed of according to our will."

Laws of Indies—IV, 12, 18 (1642):

"We order that the sale, cultivation and adjustment of lands shall be made with such precautions that *to the Indians shall*

be left the lands which may belong to them, not only as individuals, but also as communities, and the waters and streams and the lands in which may have been made aqueducts or any other improvements by which the lands have been fertilized by their personal industry; these shall be reserved in the first place and in no case shall they be sold or alienated; and the Judges which may be sent shall satisfy the Indians which are found upon the lands and shall leave the lands to each one of the old tributaries, reservados and Indian headmen, governors, absent ones and *communities*."

Laws of Indies—IV, 12, 19 (1646):

"No one shall be allowed to enter into a composition of lands unless he has possessed them for ten years, even though he may allege that he has so possessed them, because this pretext alone must not be sufficient, and *the communities of Indians shall be admitted to composition in preference to the other particular persons, granting to them every convenience*."

Laws of Indies—IV, 1, 23 (*1609*):

"It is just that the Indians shall have time to work their properties and *those of the community* and that the viceroys and governors shall proclaim that which may be necessary, to the end that they can come to their farms," etc.

Laws of Indies—VI, 1, 30:

"Those to whom Indians have been granted cannot succeed to the lands and hereditaments which may be left vacant by reason of the death of the Indians

granted without heir or successors, *and to those lands and hereditaments shall succeed the Pueblos where they resided* up to the amount which may reasonably be necessary for the payment and alleviation of the tributes which were imposed upon them and something more, and the others which may remain shall be applied to our roval patrimony."

Laws of Indies—V, 3, 6 (*1618*):

"In all the Pueblos which have more than one hundred Indians there must be two or three singers and each new Pueblo a sacristan, etc."

Laws of Indies—VI, 3, 15:

"We order that in every Pueblo and new Pueblo there must be an Indian alcalde of that place, and if there are more than 80 houses, two alcaldes and two councilmen, also Indians, and although the Pueblos may be very great, there shall not be more than two alcaldes and four councilmen, and if there should be less than 80 Indians and should amount to 40, no more than one alcalde and one councilman must be chosen on New Years, others, as is practiced in the Spanish and Indian Pueblos in the presence of curates."

Laws of Indies—VI, 3, 16, 18:

"The Indian alcaldes of the new pueblos shall have jurisdiction solely to inquire, arrest and take the delinquents to the prison of the Spanish pueblo of that district; but they can punish with a day in prison and 6 or 8 strokes, the Indian who fails at mass on the day of Fiesta or gets drunk or com-

mits any other similar fault, and if he should be very drunk he must be punished with more rigor; but leaving to the headmen that which may be punished by compelling his Indians to labor. *The government of the pueblo shall be in charge of said alcaldes and councilmen in all respects.*"

Laws of Indies—VI, 3, 29:

"We order that in the Pueblos of Indians there shall be no proprietary officers or officials other than those permitted by the government of each province and because it is ordered that where it may be absolutely necessary the officers of constable and scriveners shall be sold, our will and intention is that these shall be sold only (under) condition that the scriveners be loyal and hold the title of notary as is directed by the general law."

Laws of Indies—VI, 4, 1 (*1619*):

"Having understood that certain excesses and disorders are committed in the administration of *the common property* and mortgages of the Indians, we have found it necessary to remedy this according to the difference of time and occasion under which the different orders were made; and because the matter is of so great importance that it requires special mention, we order our viceroys, presidents, judges and officials to give particular obedience and execution as we charge it upon them that *in the community treasury* shall enter all the common property of the Indians and the instruments and guaranties. *In the community treasury must enter all the property which the body*

and collection of Indians of each pueblo may have, etc."

Laws of Indies—VI, 4, 3 (*1619*)—provides that nothing shall go into the community treasury "*which does not belong to the Indians in common*" and anything else which is put in the community treasury shall *ipso jure* be forfeited and become the property "*of the community.*"

Id. VI, 4, 4—provides that everything coming from this property (the community property) shall be put in a strong box.

Id. VI, 4, 5—directs the officials to ascertain the money in the community treasury which apparently is suitable in quantity and to cause it to be invested in new and safe mortgages "applying to each community that which is bought with this income and rents or making the *pro rata* provided by the foregoing law, but if possible distinct investments must be made *so that each community may have that which belongs to it.*

Id. VI, 4, 6—provides that if an Indian mortgage is redeemed, the amount can be combined with money of another community or other communities and each contributing community shall have a *pro rata* share as shown by the books of account, which must be credited to each of the communities clearly and distinctly.

Id. VI, 4, 9—provides that books of account are to be kept in each community treasury in which shall be entered the "necessary and common expenses of the communities to which they belong." An account must be kept of the mortgages and of the community to which each mortgage belongs. In another book, "must be made an inventory and statement as clear and complete as possible *of the Indians' Pueblos and communities* which hold a part of these mortgages, expressing the amount of rents which belongs to each one and upon what goods it is imposed, etc.

Laws of Indies—VI, 4, 10:

> "We especially desire and order that the *property of the community* shall not be taken by fraud or withdrawn from the Indians and in no case with knowledge or without knowledge, extraordinary or incidental, shall money be taken from their treasuries in small or great quantities by reason of loans, even though it may be agreed to return it immediately to them, not even for payment of guards, or for the benefit of public servants, nor for any other necessities which are or may be called public since no necessity can be more universal or privileged than that of the Indians to whom this property belongs * * *."

Laws of Indies—VI. 4, 22 (*1619*):

> *"The fiscal (district attorney) of the audiencias (high courts) must act in causes bearing upon mortgages and community*

> *goods as he thinks best, being their defender and advocate in everything which there may be, demands, requests, responses, acceptances and other judicial proceedings of every kind,* completing everything as he may be obliged so that the legal proceedings must proceed under his direction, and this is in accordance with that which has been enjoined upon all fiscals for the protection and defense of the Indians and their goods * * *."

Id. 4, 24—provides for accounting for *"everything which belongs to the communities."*

Laws of Indies—VI, 4, 33 (1621):

> "We direct the viceroys and judges of mortgages that every year they cause the Indian councilmen to send them a statement and balance of the amount of the community goods received and of the state of all those treasuries in their districts in order that the councilmen may be more careful and remedy the losses which are necessary and the district attorneys must see to it that this is done."

Laws of Indies—VI, 7, 2 (1558) directs that the courts must hear and decide the claims of Indian headmen and shall restore to the headmen the powers and jurisdiction and rights and rents of which they have been unjustly deprived and "they shall do the same *if any pueblo may have been despoiled of the right which they had to choose headmen.*"

Royal Decree of Instructions Regarding Public Lands, of October 15, 1754, one of the most important Spanish-American Laws ever passed, as it is the basis of very many Mexican titles (1 Legislacion Mexicana, Mexico, 1876, pages 13, 14):

> "The judges and officers in whom is delegated the jurisdiction over the sale and composition of crown lands shall act with lenity, forbearance and moderation, with verbal and not judicial process, in questions of lands possessed by Indians, and of other lands which they (Indians) may need, especially for their work, cultivation and stock raising; *since in regard to lands of communities and those granted to their pueblos for pastures and common lands, nothing new must be done, maintaining them in possession thereof and restoring to them those that have been taken from them and giving them more land as the exigencies of the population require,* and using no rigor in regard to those held by the Spaniards and people of other castes, keeping in mind the provisions of Laws 14, 15, 17, 18 and 19, Title XII, Book IV, of the Compilation of the Indies."

The decree further provides that lands sold or compromised, whether the persons in possession do or do not have deeds, shall be left in the quiet possession of their possessors, with proper notes on their title deeds, etc., and that when there are no title papers, *"it shall be sufficient to prove ancient possession as a title by just prescription."*

Royal Cedula of June 4, 1687 (1 Legislacion Mexicana, page 1) says:

> "It has been considered that it will be convenient to order that to the pueblos of the Indians which need lands for living and to sow, shall be given," whatever lands they may need, with the greatest liberality.

The Mexican Laws After the Separation.

These laws gave great freedom to the Indians and their pueblos. See quotations under our Point V below.

Treaties of Cession.

The treaty of Guadalupe Hidalgo, as changed by the Senate, contained the following paragraph IX:

> "The inhabitants of the ceded territory shall be incorporated in the Union of the United States and admitted as soon as possible, according to the principles of the Federal Constitution to the enjoyment of all the rights, advantages and immunities of citizens of the United States; *and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property* and the religion which they profess."

There was a protocol between our Government and the Mexican representative as follows:

> "1st. The American Government by suppressing the IXth article of the treaty of Guadalupe Hidalgo and substituting the IIId article of the treaty of Louisiana, did not intend to diminish in any way what was

agreed upon by the aforesaid article IXth in favor of the inhabitants of the territories ceded by Mexico. Its understanding is that all of that agreement is contained in the 3d article of the treaty of Louisiana. In consequence all the privileges and guarantees, civil, political and religious, which would have been possessed by the inhabitants of the ceded territories if the IXth article of the treaty had been retained, will be enjoyed by them, without any difference, under the article which has been substituted.

"2nd. The American Government by suppressing the Xth article of the treaty of Guadalupe did not in any way intend to annul the grants of lands made by Mexico in the ceded territories. These grants, notwithstanding the suppression of the article of the treaty, preserve the legal value which they may possess, and the grantees may cause their legitimate (titles) to be acknowledged before the American tribunals.

"Conformably to the law of the United States, legitimate titles to every description of property, personal and real, existing in the ceded territories are those which were legitimate titles under the Mexican law in California and New Mexico up to the 13th of May, 1846, and in Texas up to the 2nd of March, 1836."

The treaty as changed and explained by the protocol was ratified by Mexico and ratifications exchanged on May 30, 1848.

The Gadsden Treaty, ratified on June 30, 1854, contains the following:

"Article V. All the provisions of the eighth and ninth, sixteenth and seventeenth

articles of the treaty of Guadalupe Hidalgo, shall apply to the territory ceded by the Mexican Republic in the first article of the present treaty, and to all the rights of persons and property, both civil and ecclesiastical, within the same, as fully and as effectually as if the said articles were herein again recited and set forth."

These treaties were merely declaratory of the general principles of international law, which provide that in case of cession all the personal and property rights of the inhabitants continue, and our rights are not at all confined to the words of the treaties.

History Since 1853.

This has been a history of neglect. Nothing was done for the Papagos before 1874, when the San Xavier reservation, ten miles square, was set apart by the President, and in all these years they have persuaded only about 500 Papagos to come on the reservation—and this is not strange, for they cannot live upon it except as beggars or as day laborers for white men.

In all these sixty years there has been no congressional action whatever covering the Santa Rosa land, or indeed covering any of the Papago land, except that beginning in 1912 Congress has passed one or two small appropriations for the development of a water supply for domestic and stock purposes and for irrigation. The

Government argues that Congress has great powers over all Indian lands and rights; it has no such power over pueblo land, and even if it had, it is enough to say that Congress has not exercised any such power, and neither the chief executives nor other government officials have any such power without congressional action.

During these sixty years there has been constant private encroachment by miners and men who have stolen water and squatted on land. The Government has not protected the Papagos.

During all this time the Papago Pueblos have maintained themselves and their village organization and their civilization without disturbing others and without decrease of their numbers. They have held their own and have advanced—no thanks to the white men.

Our Claim.

Our claim and theory is that our Indian Pueblo is a corporation, that as such it owns the entire tract occupied by the Pueblo and its inhabitants, that it is a juridical entity having a right of recourse to the courts and that the courts can and will protect its rights and title.

The Aggressions of the Defendants.

The plaintiff complains that the defendants, without warrant of law and without any discretionary power or right, are threatening illegal

acts subversive of our rights, and must be enjoined. These are set out in paragraphs VII and VIII of the complaint and not denied. [Transcript, folios 7 to 9.]

The Claim and Theory of the Government.

As we understand it, the Government contends that the Santa Rosa Indians have as against the Indian Commissioner and the Secretary of the Interior absolutely no right of property or person—no right to appear in any court, and if they can appear, no right which can be protected by any court—only a right (?) to stay on their lands at the sufferance of the Government and to beg Congress for charity.

BRIEF OF THE ARGUMENT.

I.

The Pueblo of Santa Rosa can sue as a juridical entity.

Laws of New Mexico of 1847, *published with Laws of New Mexico of* 1852.
9 *U. S. Statutes at Large*, 446.
Statutes of New Mexico of 1852.
10 *U. S. Statutes at Large*, 575.
12 *U. S. Statutes at Large*, 164.
Howell's Code, 1865, p. 439.
Ponce v. The Roman Catholic Church, 210 U. S., 296.

Leitensdorfer v. Webb, 20 How. U. S., 176.

Constitution of Arizona, Article 14, Section 1.

Siete Partidas, Book 1, Title 2, Law 5.

Dillon's Municipal Corporations, 5th Edition, Volume 1, page 71, Section 50.

Terrett v. Taylor, 9 Cranch, 43, 46.

Pawlet v. Clark, 9 Cranch, 292, 328.

Governor v. Allen, 8 Hump., 176.

Alcubilla Diccionario de la Administracion Espanol, Volume 8, page 672.

Mexican Code of 1884, Article 38.

Commonwealth v. Roxbury, 75 Mass., 451.

Spaulding v. City of Lowell, 40 Mass., 71, 78.

City of Lynn v. Inhabitants of Nahant, 113 Mass., 433.

Porter v. Sullivan, 73 Mass., 441.

Hill v. Boston, 122 Mass., 344, 349.

Inhabitants of 4th School District in Rumford v. Wood, 13 Mass., 193.

Handbook of the Indians, page 622.

San Francisco v. United States, Federal Cases No. 12,316.

Townsend v. Greely, 5 Wall., 326.

Knight v. The Land Association, 142 U. S., 161.

Merryman v. Bourne, 9 Wall., 592.

Palmer v. Low, 98 U. S., 1.
Nambe v. Romero, 10 N. M., 58.
Territory of New Mexico v. Delinquent Taxpayers, 12 N. M., 139.
United States v. Pico, 5 Wall., 536.
United States v. Lucero, 1 N. M., 422.
United States v. Varela, 1 N. M., 593.
Devine v. Los Angeles, 202 U. S., 313.
Los Angeles Milling Company v. Los Angeles, 217 U. S., 217.
Laws of New Mexico of 1853-4, page 142, Section 3.
Compiled Laws of New Mexico of 1897, Section 1678.
Zia v. United States, 168 U. S., 198.
Laguna v. Acoma, 1 N. M., 220.
Victor de La O. v. Acoma, 1 N. M., 226.
De Baca v. Pueblo of Santo Domingo, 10 N. M., 38.
United States v. Joseph, 94 U. S., 614. 619.
19 *Land Office Decisions*, 326.

II.

The Pueblo of Santa Rosa has title to this land.

Hamilton on Mexican Law, page 132.
2 *White Recopilacion*, page 562.
Sanchez v. Gonzalles, 11 Martin (La.), 207.

Laws of the Indies, L-4, T-12, L-15.
12 *Manresa Commentaries*, 830.
Siete Partidas, Book 3, Title 29, Law 7.
8 *Alcubilla Diccionario*, 839.
United States v. Santa Fe, 165 U. S., 675, 710.
Crespin v. United States, 168 U. S., 208, 218.
United States v. Lucero, 1 N. M., 422, at page 466.
Hall's Laws of Mexico, Section 159.
Extra Census Bulletin, 1893, page 9.
United States v. Chavez, 175 U. S., 509, 520.
United States v. Chavez, 159 U. S., 452, 464.
United States v. Devereux, 90 Fed. 182, 186 (C. C. A.).
Oaksmith v. Johnston, 92 U. S., 343.
United States v. Pendell, 185 U. S., 189.
Fletcher v. Fuller, 120 U. S., 534.
Penny v. Coke Company, 138 Fed., 769 (C. C. A.).
10 *U. S. Statutes at Large*, 308.
Merryman v. Bourne, 9 Wall., 592.
U. S. Revised Statutes, Section 2126.
Felix v. Patrick, 36 Fed., 457, 461; 145 U. S., 317.
United States v. Joseph, 94 U. S., 614.
19 *Land Office Decisions*, 326.

United States v. Sandoval, 231 U. S., 28, 48.

Carino v. Insular Government of the Philippine Islands, 212 U. S., 449.

III.

The Claim of the Pueblo of Santa Rosa is not barred by failure to assert the same before the Court of Private Land Claims or before Land Commissioners.

Ainsa v. N. M. and Arizona R. R. Co., 175 U. S., 76.

Richardson v. Ainsa, 218 U. S., 289.

IV.

The character and titles of the Papagos and their Pueblos, including Santa Rosa, are established by certain interesting and important cases in the New Mexican Territorial courts, which, although decided with regard to New Mexican Pueblos, apply equally to the similar Papago Pueblos.

United States v. Lucero, 1 N. M., 422.

United States v. Varela, 1 N. M., 593.

United States v. Joseph, 94 U. S., 614, 618.

The Territory of New Mexico v. Delinquent Taxpayers, 12 N. M., 139.

V.

The Pueblo Indians were citizens of Mexico at the time of the cession, and having elected to remain in the United States, they are now, under the treaty, citizens of the United States.

"*Mexico*," by Brantz Mayer, 1854, page 128.

Reynold's Spanish and Mexican Land Laws, 282.

United States v. Ritchie, 17 How., 525, 541.

United States v. Joseph, 94 U. S., 614.

United States v. Lucero, 1 N. M., 422, 425.

VI.

The Papagos are different in every respect from the North American tribes and similar to the civilized North American Pueblo Indians.

Statutes of New Mexico of January 10, 1853; Pamphlet, page 29.

United States v. Joseph, 94 U. S., 614.

United States v. Sandoval, 231 U. S., 28.

Jaeger v. United States and The Yuma Indians, 29 Court of Claims, 172.

VII.

Indian wardship has nothing to do with this case.

United States v. Sandoval, 231 U. S., 28.
United States v. Joseph, 94 U. S., 614.
United States v. Conway, 175 U. S., 60.
Re Kansas Indians, 72 U. S., 737.
Cherokee Nation v. Hitchcock, 187 U. S., 294.
Felix v. Patrick, 36 Fed., 457, 461.
Felix v. Patrick, 145 U. S., 317.

VIII.

The Papago Reservation Order of January 14, 1916, is irrelevant and unimportant except as being in the nature of a further assertion of title by the Government and further aggression by the Government upon the plaintiff's rights, pending the determination of those rights in this Court.

IX.

The executive orders and legislation regarding the Papagos (apart from the reservation order of January 14, 1916, which is discussed above) are entirely unimportant, both because they are irrelevant to the issues and because they are insignificant in amount and unimportant in character.

X.

This suit does not constitute an interference with the administrative functions of the defendants, nor is it a suit against the Government, nor is it an action for trying the title to land.

Gauthier v. Morrison, 232 U. S., 452.
Lane v. Watts, 234 U. S., 525.

XI.

This Court, in the exercise of its appellate jurisdiction, has power to make such disposition of this case as justice may at this time require.

Watts etc. Company v. Unione etc. (decided November 4, 1918).
1 *U. S. Supreme Court Advance Opinions*, 1918-19, 1.

ARGUMENT.

POINT I.

The Pueblo of Santa Rosa can sue as a juridical entity in this Court.

1. IT IS A CORPORATION WITH POWER TO SUE UNDER THE STATUTES OF ARIZONA.

In 1847, when General Kearney was the military governor of the territory now constituting New Mexico, the following statute was duly and validly passed in December, 1847. (See *Law of*

New Mexican Legislature of 1847, officially published with *New Mexican Laws of 1852.*)

> *An Act to Enable Pueblo Indians to Bring and Defend Actions:* "The inhabitants within the territory of New Mexico known by the name of Pueblo Indians, and living in towns or villages built on lands granted to such Indians by the laws of Spain and Mexico, and conceding to such inhabitants certain lands and privileges, to be used for the common benefit are severally hereby created and constituted bodies politic and corporate and shall be known in the law by the name of the Pueblo de ———— (naming it) and by that name they and their successors shall have perpetual succession, sue and be sued, plead and be impleaded, bring and defend in any court of law or equity all such actions, pleas, and matters whatsoever, proper to recover, protest, reclaim, demand or assert the right of such inhabitants, or any individual thereof, to any lands, tenements or hereditaments, possessed, occupied or claimed contrary to law, by any person whatsoever, and to bring and defend all such actions and to resist any encroachment, claim or trespass made upon such lands, tenements or hereditaments, belonging to such inhabitants, or to any individual." (December, 1847.)

This statute was published in Spanish as well as English and there are some indications that the original was in Spanish. Both in the title and in the law itself, the Spanish phrase for Pueblo Indians is "los indios de pueblo," that is "Indian Villages."

In 1850, New Mexico was created a territory by Act of Congress (*9 U. S. Statutes at Large, 446*), which provides (*Section 7*) that the legislative power of the territory be extended to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of that Act.

At the first session of the territorial legislature of New Mexico in 1851, the following statute was passed and approved on July 14, 1852. (*New Mexico Statutes of 1852.*)

> "That all laws that have previously been in force in this Territory that are not repugnant to or inconsistent with the Constitution of the United States, the organic law of the Territory, or any act passed at the present session of the Legislative Assembly, shall be and continue in force, except in Kearney's Code the law concerning Registers of Land."

This carried forward the Kearney statute and made it a part of the Laws of the Territory of New Mexico.

By the Gadsden Treaty, concluded December 30, 1853, and proclaimed June 30, 1854, the Papago Indian land now in question became a part of the United States, and on August 4, 1854, Congress passed the following statute (*10 U. S. Stat. at Large, 575*):

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* that until

> otherwise provided by law the Territory acquired under the late treaty with Mexico, commonly known as the Gadsden Treaty, be and same is hereby incorporated with the territory of 'New Mexico' subject to all the laws of said last named territory."

This made the Kearney statute part of the statutes of the enlarged territory.

By resolution passed February 9, 1854, the New Mexican Legislature ordered that a compilation of the New Mexican statutes should be made, approved by the Governor and published and distributed at the expense of the state. This official compilation was published in 1856, and it included the Kearney statute above quoted as a part of the laws of New Mexico, so that it was not only in theory a part of those laws, but it was published and known as such.

By Act of Congress approved February 23, 1863 (*12 U. S. Statutes at Large, 164*) Arizona was separated from New Mexico and created an independent territory and the act provided that the old act of Congress creating the territory of New Mexico and the acts amendatory thereof *"together with all legislative enactments of the Territory of New Mexico not inconsistent with the provisions of this act are hereby extended to and continued in force in the said Territory of Arizona until repealed or amended by future legislation."*

This made the statute a part of the laws of Arizona.

The newly created territory enacted the so-called *"Howell's Code,"* approved November 10, 1864, by which it repealed all existing laws, but provided that

> "This repeal shall not affect any rights acquired or proceedings had under and by virtue of any such laws, customs, decrees or legislative enactments." (Howell's Code, 1865, p. 439.)

At the date of the repealer, the Pueblo of Santa Rosa had full corporate existence and its corporate character was not affected by the repeal. Indeed, Chapter 25 of *Howell's Code* (which contained the repealer), recognized the existence of villages incorporated under a prior law of Mexico or New Mexico, for it provides that *"any territory not included in any incorporated village"* might be incorporated as a village in the manner provided by the chapter.

At the time of the cession by Mexico and on August 4, 1854, when Congress made the Papago land a part of New Mexico "subject to all the Laws of said territory," and on February 23, 1863, when the Kearney statute was by Congress made a part of the laws of the newly created territory of Arizona, the inhabitants of Santa Rosa complied exactly with the conditions and prescriptions of the Kearney statute. They

were inhabitants of the designated territory; they were "known by the name of Pueblo Indians." They lived in villages "built on lands granted to such Indians by the *laws* of Spain and Mexico," which laws conceded to such inhabitants in their collective capacity "certain lands and privileges to be used for their common benefit."

The statute did not say that the Indians should have grants from Spanish or Mexican officials, but only that they should have lands and rights granted by the law, and as we have shown above, the Mexican and Spanish laws did grant to or recognize in all Indian Pueblos, both property rights and legal privileges. The inhabitants of Santa Rosa were, on August 4, 1854, and on February 23, 1863, known as "Pueblo Indians" or "indios de pueblo"; this was the Spanish name and as it was a Spanish country, there was no question of any English name or of any English usage. The uniform Spanish usage was to call the Indian villages "Pueblos," whether they were constructed of composite houses as in New Mexico or simple houses as in Papagueria and "indios de pueblo" meant and could only mean village Indians. There was nothing technical about it; neither the Spanish usage or English usage confined the phrase "village Indians" or "Pueblo Indians" to the occupants of composite houses, and on the

contrary the phrase was used to distinguish the civilized Indians living in villages from the "barbarous Indians" or "hostile Indians" or "savage Indians." That the phrase "Pueblo Indians" was applied by America at the time to the Papagos is clear from the citations above, and even if it be true that in contemporary speech the words "Pueblo Indians" are sometimes used as meaning only the New Mexican Pueblo Indians, it would not be strange, for those Indians have been widely advertised recently, whereas the Papagos have been unknown.

It is, of course, the usage in 1847 and 1853 and 1863 which determines the effect of the statute.

It is clear, then, that the Kearney statute applied to the Papago Indians and that if the Pueblo of Santa Rosa was not a corporation at the time of the cession, it certainly became a corporation with full power to sue by the operation of the Act of Congress of August 4, 1854, or of the Act of Congress of February 23, 1863. In this aspect each one of these statutes was a valid incorporating act for the Pueblo of Santa Rosa, taking effect fully and at once; any one is sufficient and when incorporated, Santa Rosa necessarily remained a corporation for all time. As a matter of fact, no such incorporation or reincorporation was necessary because Santa Rosa was a corporation by immemorial

and prescriptive right, like the Catholic Church (*Ponce v. The Roman Catholic Church*, 210 U. S., 296), recognized, and if necessary, reincorporated by the effect of the Spanish law above referred to.

The validity of the Kearney Legislation in general was recognized in *Leitensdorfer v. Webb*, 20 How. U. S., 176.

2. THE PUEBLO OF SANTA ROSA WAS EITHER CREATED OR RECOGNIZED AS A CORPORATION BY THE ARIZONA CONSTITUTION.

Article 14, Section 1, provides:

> "The term 'corporation' as used in this Article, shall be construed to include all associations and joint stock companies having any powers or privileges of corporations not possessed by individuals or co-partners and corporations shall have the right to sue and shall be subject to be sued in all courts, in like cases as natural persons."

Here again such re-incorporation was unnecessary, but this constitutional provision prevents any doubt. For if Santa Rosa was not a corporation before the constitution was approved, it was certainly an association having certain "powers or privileges of corporations not possessed by individuals or co-partners," to wit, the power to hold property in a collective capacity, to have succession, to act as an entity, etc. Accordingly this provision of the Constitution

made it clear that it is a corporation with "the right to sue * * * in like cases as natural persons."

3. THE PUEBLO OF SANTA ROSA WAS A CORPORATION BY IMMEMORIAL PRESCRIPTION, UNDER THE SPANISH AND MEXICAN LAW, AND ITS CHARACTER AS A CORPORATION WAS PRESERVED BY THE ORDINARY PRINCIPLES OF INTERNATIONAL LAW AND BY THE TERMS OF THE TREATIES MENTIONED ABOVE AND BY THE NEW MEXICAN STATUTES.

The right to be a corporation and to be recognized as such may be acquired by immemorial user. This is the general law. It is the law of Spain and Mexico, as shown by the old Spanish law stated in *Siete Partidas* (declared in 210 U. S. 312, to be "the fundamental code of ancient Spanish Law"), *Book I, Title 2, Law 5:*

> "A pueblo is the name given to a community of people of every kind of the country where they are gathered together * * * and if for ten or twenty years they have habitually done anything, by way of custom, the Lord of the land knowing it and not objecting and approving, the pueblo, whatever it is, or the greater part of it, can do that thing and it must be held and protected by custom. * * * And, moreover, we say that the custom which the pueblo desires to establish and use must be consistent with right reason and not contrary to the law of God or the Seigniory

> or natural right, nor against the general interests of the land where it is done."

This is also the law in this Court as was proved by the very interesting and important case of *Ponce* v. *Roman Catholic Church*, 210 U. S., 296, where after full discussion and citation, this Court held that the church at common law and by immemorial usage was an entity capable of holding property and bringing suit. The Court says (pp. 313, 319):

> "As to England, the concept of the church as a corporation was worked out by English canonists and fully recognized by the ordinary lower courts before the end of the Fourteenth Century. * * *
>
> "The proposition, therefore, that the church had no corporate or jural personality seems to be completely answered by an examination of the law and history of the Roman Empire, of Spain and of Porto Rico down to the time of the cession, and by the recognition accorded to it as an ecclesiastical body by the Treaty of Paris and by the law of nations."

This has always been the law of England and of this country. Even in Magna Charta, Sec. 16 expressly provides that a "grant" of corporate power shall not be necessary in order to constitute a municipal corporation; and Cooley in his "Constitutional Limitations" page 276, says: "It seems to be the law that the corporate existence may be maintained on the ground of

prescription, that is to say, the exercise of corporate rights for a time whereof the memory of man runneth not to the contrary is sufficient evidence that such rights were once granted by competent authority and are therefore now exercised by right and not by usurpation."

In the same way Dillon in his "Municipal Corporations" (5th Ed. Vol. I, page 71, Sec. 50), says that in England corporations exist "1. By common law; 2. By *prescription*. Corporations at *common law* are those which derive their existence and powers from immemorial usage, although they may have had their origin in an act of Parliament or a royal grant no longer discoverable. Those by *prescription* presuppose a grant by charter or act of Parliament, which has been lost." He further says that:

> "The exercise of corporate powers by a place for twenty years without objection and with the knowledge and assent of the legislature, furnishes conclusive evidence of the charter which has been lost; or in other words, of a corporation by prescription which presupposes a grant".

We may also refer to the following cases:

Terrett v. Taylor, 9 *Cranch*, 43, 46, with regard to Church wardens.

Pawlet v. Clark, 9 *Cranch*, 292, 328.

Governor v. Allen, 8 *Hump.*, 176, with regard to the Governor of a state as a corporation sole.

4. THE CORPORATE CHARACTER OF INDIAN PUEBLOS WAS FULLY RECOGNIZED BY SPANISH LAW AND SPANISH AND MEXICAN STATUTES.

The Spanish law, in force in Mexico, was clear that Pueblos are juridical entities with power to sue. We need quote only from the recognized Spanish Dictionary of Law, *Alcubilla Diccionario de la Administracion Espanol*, Vol. 8, p. 672.

> "*Personality* is the legal ability to appear in law suits."
>
> "*Persons* * * * A juristic person is in law a collective and impersonal moral entity in which the law recognizes certain rights * * * The state or nation, provinces, pueblos (villages), churches, public establishments, societies, etc., are juridical or collective or moral persons because they have their own property, rights and obligations. The exercise of their rights and the payment and performance of certain obligations on the part of moral persons is subject to certain rights which cannot be evaded, as for instance, appeals in a law suit which in some cases requires previous authority and in other cases an administration proceeding, etc."

The same view was held in Mexico after its independence as shown by the definition in the existing Mexican Code, which, although passed in 1884, re-enacted the prior law.

Article 38—

> "The following are moral persons and as such they have juridical entity:

1. The nation, the states and the municipalities.
2. The associations and temporal or perpetual corporations established with any purpose or any motive of public utility or of public and private utility jointly.
3. Civil or mercantile societies formed in accordance with law.

We have quoted largely above from the Spanish statutes recognizing in the Indian pueblos various corporate rights, such as the right to hold real property as an entity and the right to appear in Court through a law officer and the right to perform various functions through its elected officers, etc., etc. There are many more such citations. Any statute recognizing corporate character in such case is conclusive on the subject of corporate character, as is shown in the cases of the New England towns.

Commonwealth v. Roxbury, 75 Mass., 451, saying (p. 500):

> "It is believed that no formal act of incorporation of any town was passed during the existence of the Colonial government," and that (p. 486):
>
> "Lands were allotted and assigned to settlers in severalty and settlements were formed without any previous survey of the territory, and towns as settlements were taxed and vested by general acts with powers, which in effect made them corporations but without bounds or limits."

Spaulding v. City of Lowell, 40 *Mass.*, 71, 78, saying:

> "From this and various other legal provisions, we think it will be found that towns were not originally incorporated with specific and enumerated powers, but that the inhabitants and settlers of each township, as organized bodies, adopted regulations for their common convenience, *and when they were incorporated, or rather recognized by general laws as established corporations*, the powers which they had thus been used and accustomed to exercise were referred to and confirmed under the very broad and comprehensive term 'prudential concerns.'"

City of Lynn v. Inhabitants of Nahant, 113 Mass. 433, saying:

> "Upon the settlement of the Massachusetts Colony (p. 447), the several towns or plantations were at first mere villages or clusters of settlers dwelling near each other; but by successive acts of the General Court, authorizing them to manage their own affairs and to elect representatives and local officers, they soon became in effect municipal corporations, without any express legislative act or charter."

Porter v. Sullivan, 73 Mass., 441.

Hill v. Boston, 122 Mass., 344, 349.

Inhabitants of 4th School District in Rumford v. Wood, 13 Mass., 193.

Held—That the school district could sue as a quasi corporation, lacking some of the general powers of corporations, the Court saying:

> "The same may be said of towns, and other municipal societies which, although recognized by various statutes, and by immemorial usage, as persons, or aggregate corporations, with precise duties which may be enforced, and privileges which may be maintained, *by suits at law*, are yet deficient in many of the powers incident to the general character of corporations. They may be considered under our institutions as quasi corporations, with limited powers, coextensive with the duties imposed upon them by statute or usage."

That the Spanish law and administration recognized and organized and developed the Indian Pueblos is well shown by the following quotation from the Handbook of the Indians, at page 622, in the article on *"Spanish Influence."*

> "The Spaniards made some changes in the method of government of the New Mexican Pueblos, causing each to elect annually a governor and other civil officers, a custom still prevailing."

5. THE CORPORATE CHARACTER OF INDIAN AND SPANISH PUEBLOS IS RECOGNIZED BY OUR COURTS, FOR THEY HAVE REPEATEDLY UPHELD TITLES HELD BY OR DERIVED THROUGH INDIAN AND SPANISH PUEBLOS, AND IN THIS RESPECT THERE IS NO POSSIBLE DISTINCTION BETWEEN INDIAN AND SPANISH PUEBLOS.

Such cases are the following:

San Francisco v. U. S., Fed. Cases No. 12,316.

Townsend v. Greely, 5 Wall., 326.

Knight v. The Land Association, 142 U. S., 161.

Merryman v. Bourne, 9 Wall., 592.

Palmer v. Low, 98 U. S. 1.

Nambe v. Romero, 10 N. M., 58 (Indian Pueblo).

Territory of New Mexico v. Delinquent Tax Payers, 12 N. M., 139 (Indian Pueblo).

U. S. v. Pico, 5 *Wall.,* 536 (Indian Pueblo).

In the following cases the question of title was not directly involved but the language of the court is strong as showing that title was in the pueblos.

U. S. v. Lucero, 1 N. M., 422 (Indian Pueblo).

U. S. v. Varela, 1 N. M., 593 (Indian Pueblo).

In many of the above cases the pueblo titles were confirmed by Congress, but notwithstanding this fact the above cases necessarily hold that the pueblos had title before the confirmation and independent of the confirmation; for it has been held in several cases that the Congressional confirmation does not give a title, that it always presupposes a full right in the pueblo at the time of the cession, and that by the con-

firmation the government merely puts the stamp of its approval upon a pre-existing right either legal or equitable. The above cases show that the pueblos had a full, legal or equitable right to the land at or prior to the cession and thus establish the right to hold title in a corporate capacity. Cases regarding the effect of Congressional confirmation are the following:

Devine v. Los Angeles, 202 U. S., 313.
Los Angeles Milling Co. v. Los Angeles, 217 U. S., 217.

6. BY THE STATUTES OF NEW MEXICO, RE-ENACTED IN ARIZONA AS SHOWN ABOVE, IT WAS PROVIDED THAT THE INDIAN PUEBLOS SHOULD HAVE A RIGHT TO ELECT THE OFFICERS OF THE PUEBLOS "ACCORDING TO THEIR ANCIENT CUSTOMS."

Laws of New Mexico of 1853-4, p. 142, Sec. 3;
Comp. Laws, 1897, Sec. 1678, cited and quoted in 231 *U. S.,* 40.

This statute constituted an important recognition by New Mexico and Arizona of the corporate character of the Pueblos and of the validity of their "ancient customs"; it was as truly a recognition and establishment of these villages as juridical entities as were the New England statutes.

7. THE RIGHT AND POWER OF THE NEW MEXICAN PUEBLOS TO SUE AND BE SUED IS RECOGNIZED BY THE UNITED STATES COURTS, AND THE PAPAGO PUEBLOS MUST EQUALLY BE RECOGNIZED.

In the followinig cases New Mexican Pueblos were allowed to appear as plaintiff or defendant:

Zia v. U. S., 168 U. S., 198.

Laguna v. Acoma, 1 N. M., 220.

Victor de La O. v. Acoma, 1 N. M., 226.

De Baca v. Pueblo of Santo Domingo, 10 N. M., 38.

Nambe v. Romero, 10 N. M., 58.

Pueblos of Santo Domingo and San Felipe v. U. S., 21 Sup. Ct. Rep., 915.

The Pueblos in the cases cited were not debarred from suit on the theory of wardship or on any other theory. If they are wards of the government in any such sense as this (which we deny), the above cases are clear that such wardship does not take away the right to sue. There was no such disability in the Territorial Courts of New Mexico or in this Court.

The right of the New Mexican Pueblo to sue, irrespective of any theory of wardship, is established by the *Joseph* case, 94 U. S., 614, 619:

> "If the defendant is on the lands of the Pueblo without the consent of the inhabitants, he may be ejected or punished civilly

> by a suit for trespass according to the laws regulating such matters in the territory,"

and this suit must necessarily be by the pueblo as a corporation, because this Court recognizes title in the pueblo.

The right of the pueblo to sue is also recognized by the Interior Department, and the Attorney General in 19 *"Decisions of Department of the Interior Relating to Public Lands,"* page 326.

POINT II.

The Pueblo of Santa Rosa has title to this land.

We have shown above that it has power to hold title. We shall show here that it does hold title on one or both of two theories.

1. IT HAS TITLE BECAUSE THE SPANISH LAWS AND DECREES, SUCH AS THOSE WHICH WE HAVE QUOTED ABOVE, HAVE RECOGNIZED ITS IMMEMORIAL TITLE, COMING FROM AZTEC TIMES, OR HAS GRANTED TITLE TO IT.

2. QUITE APART FROM THOSE SPANISH LAWS AND DECREES, THE PUEBLO OF SANTA ROSA HAS TITLE BY PRESCRIPTION UNDER THE SPANISH LAW, OR, WHAT AMOUNTS TO THE SAME THING, BY PRESUMPTION OF LOST GRANT UNDER OUR LAW.

(a) It had at the time of the cession and now has perfect title by prescription under the

Spanish law by reason of immemorial possession.

All the facts necessary for adverse possession under our law and prescription under the Spanish law were present; actual, notorious, permanent and exclusive possession under claim of ownership, within definite boundaries, from time immemorial. All of these facts will appear from the quotations above made, except the definite boundaries, and these are clearly alleged in the complaint and will be proved by the Indians, and must for the purpose of this motion, be considered as established.

By the laws of Spain and Mexico, prescription ran against the King and immemorial possession, and indeed possession for forty years gave a perfect title even as against the state.

Royal Instruction of 1754 (see *Hamilton on Mexican Law,* p. 132) provided that titles coming from the King should be registered and that from those who had no written titles should be required a sworn declaration of local possession which "should suffice as a just title by prescription." This decree was of great importance and has been the basis of judicial decisions regarding Mexican titles down to the present time, and it makes it very clear that a title by prescription is good as against the state.

The law to this effect was also definitely declared by the *"Royal Decree Concerning Crown*

Lands" in the Colonies, of July 16, 1819 (2 White Recopilacion, 562), which provided with regard to crown lands that "in the absence of other title a just prescription, that is, a possession of forty years duly approved according to law shall be admitted and respected." This decree was recognized in 168 *U. S.*, 208, 218. It was the law of the Papago land from 1819 until 1864, when the Howell Code of Arizona was passed, for as is shown above, the Kearney Code continued in force all Mexican laws except as expressly repealed, and these laws thus remained in force until Arizona was separated and until the Howell Code was passed.

Quite apart from this decree, prescription always ran against the state in the Spanish colonies, as was held in a strong opinion in *Sanchez v. Gonzalles*, 11 *Martin* (La.), 207, citing the old laws of the Indies. The following authorties are to the same effect:

Laws of the Indies, L-4, T-12, L-15.
12 Manresa Commentaries, 830.
Siete Partidas, Book 3, Title 29, Law 7.
8 Alcubilla Diccionario, 839.

This Court recognizes that prescription runs against the state under the Spanish law and that titles based thereon are good.

U. S. v. Santa Fe, 165 *U. S.*, 675, 710.
Crespin v. U. S., 168 *U. S.*, 208, 218.

With regard to one at least of the New Mexican Pueblos, which received confirmatory grants from Congress, and whose titles have been repeatedly upheld, there was no written title, but only a title by immemorial possession, and this prescriptive title was upheld by the Court in *U. S. v. Lucero*, 1 *N. M.*, p. 422, at page 466, where the Court held that such a prescriptive title was the best kind of a title and needed no grant or confirmation from the Mexican authorities. It has been held repeatedly that the Congressional confirmation was not the grant of a new title but only a quit-claim to a Pueblo which already had full right under the Mexican law.

This is undoubtedly the theory on which Hall in his *Mexican Law* bases his statement (Sec. 159):

> "It is clear from the whole tenor of the Spanish and Mexican laws, whether in the form of pueblos or ranchos, that the Indians are entitled, in equity and good conscience, and even according to the strict rigor of the laws, to all the lands they have or have had in actual possession for cultivation, pasture, or habitation, when such domain can be ascertained to have had any tolerably well defined boundaries."

It is significant that the executive branch of our government has clearly recognized this principle of Indian pueblo ownership and the

fact of Indian pueblo titles in a closely similar case, that is, the case of the Moqui or Hopi Indians in Arizona. In a report of the pueblos of the Moqui Indians, published as an extra census bulletin in 1893, the action of our government is stated as follows at page 9:

> "The Moqui Indians lived upon lands in Arizona which they were permitted to occupy by the Spanish and Mexican powers, and which became grants by reason of town occupation for a long period. The grants are not yet defined, but were tacitly recognized by President Arthur in his proclamation of December 16, 1882, when he threw about them the protection of a reservation to keep off white people and the Navajos. The Indians are citizens of the United States under the treaty of Guadalupe Hidalgo. Sixteen of the pueblos of New Mexico own their lands in fee and the inhabitants of all are citizens of the United States. The allotment of the lands of the Moqui Pueblos compelling the holders to reside upon them, would abolish the villages and pueblos, disperse these Indians, and make them dependents."

(b) By a somewhat similar reasoning, our Courts reached the same result by holding that where there has been long continued possession even as against the state, the Courts will presume that a grant existed and has been lost.

U. S. v. Chavez, 175 *U. S.*, 509, 520, holding that

> "Upon a long and uninterrupted possession of lands in Mexico, beginning long prior to the transfer of the territory in which they are situated to the United States, and continuing after that transfer, the law bases presumptions as sufficient for legal judgment in favor of the possessor, in the absence of rebutting circumstances." (See headnote.)
>
> "Thus, also, though lapse of time does not of itself furnish a conclusive bar to the title of the sovereign, agreeably to the maxim, *nullum tempus occurrit regi;* yet if the adverse claim could have had a legal commencement, juries are advised or instructed to presume such commencement, after many years of uninterrupted possession or enjoyment. Accordingly royal grants have been thus found by the jury, after an indefinitely long-continued peaceful enjoyment accompanied by the usual acts of ownership. 1 Greenleaf Ev., Sec. 45."
>
> "The principle upon which this doctrine rests is one of general jurisprudence, and is recognized in the Roman law and the codes founded thereon, Best's Principles of Evidence, Sec. 366, and was, therefore, a feature of the Mexican law at the time of the cession."
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> *U. S. v. Chavez*, 159 *U. S.*, 452, 464.
>
> "It is the general rule of American law that a grant will be presumed upon proof of an adverse exclusive and uninterrupted possession for twenty years, and that such rule will be applied as a *presumptio juris et*

de jure whenever by possibility a right may be acquired in any manner known to the law."

To the same effect are the following cases:

U. S. v. Devereux, 90 *Fed.*, 182, 186 (C. C. A.).

Oaksmith v. Johnston, 92 *U. S.*, 343.

U. S. v. Pendell, 185 *U. S.*, 189.

Fletcher v. Fuller, 120 *U. S.*, 534.

Penny v. Coke Company, 138 *Fed.*, 769 (C. C. A.).

That this presumption of lost grant is considered by Congress and is fully recognized by the government officials as applying to Pueblo land is shown by the words of the Commissioner of the General Land Office, who under date of February 17, 1881, wrote a letter of instruction to the Register and Receiver of the Land Office in Arizona, as follows:

> "As a matter of fact, Congress has never confirmed any claim that has been presented to the surveyor general, unless a grant from the former government was established, except in the case of a city or town *found to be in existence when the United States took possession of the territory, when a grant was presumed.*"

3. By legislative and executive action the United States has recognized that the New Mexican and Arizona pueblos have title and that the Papago pueblos are like the New Mexican.

By the *Act of July 22, 1854* (10 *U. S. Statutes at Large*, 308), the surveyor general was directed to make a full report regarding land claims under the laws, usages and customs of Spain and Mexico, "denoting the various grades of title with his decision as to the validity or invalidity of each of the same under the laws, usages and customs of the country before its cession to the United States; and shall also make a report in regard to all pueblos existing in the territory, showing the extent and locality of each, stating the number of inhabitants in the said pueblos respectively and the nature of their titles to the land."

This statute was passed before the addition of the Gadsden territory to New Mexico and accordingly the reports and subsequent action did not include the Papago land.

But in the surveyor general's report for 1861, he reports on all the pueblos in the enlarged New Mexico, including the Papago land, and he gives a list of forty-eight pueblos which include the nineteen New Mexican pueblos whose grants were confirmed in 1858 by Congress, and also eleven Papago pueblos, including the Pueblo

of Santa Rosa as No. 46. There is no distinction in his list or in his report between Papago pueblos and the New Mexican pueblos, consisting of composite houses and having their grants confirmed by Congress—and this was right, for there never was any legal or practical distinction. All stood on the same footing under the Spanish Laws and at the time of the cession and all had their rights equally preserved by treaty, and it is of no consequence that nineteen New Mexican pueblos asserted their titles before the surveyor general, (one at least showing merely a title by immemorial possession, *U. S. v. Lucero,* 1 N. M. 422), while on the other hand the Papago pueblos were ignored in their desert corner and rested quietly on their rights.

That part of the surveyor's list which comprised the Papago pueblos is as follows:

"No.	Name of Pueblo.	1860 Population.	Personal Estate.	Remarks.
21	San Xavier	170	$6,325	Papago pueblo 9 mi. So. of Tuckson old Jesuit Mission.
39	Cumaro			
40	Tecolate			
41	Charco			
42	Pirigua			
43	Ocaboa	*3500	*125,000	
44	Cojate			
45	Coca			
46	Santa Rosa			
47	Cahhavi			
48	Llano			

Papago Pueblos.

*Estimated."

The words "Papago Pueblos" are printed in as shown above.

The above list is prefaced by the following: "Statement showing respectively the names of all the Indian pueblos in New Mexico, with their localities, population, wealth, etc., and the times when their land claims were confirmed by Congress and when surveyed and the areas thereof."

This report is of much importance as showing that the Papagos, including the inhabitants of Santa Rosa were recognized by the government at the time as Pueblo Indians.

4. THE RIGHTS OF THE PUEBLO OF SANTA ROSA WERE FULLY PRESERVED NOT ONLY BY THE TREATY PROVISIONS ABOVE QUOTED, BUT ALSO BY THE PRINCIPLES OF INTERNATIONAL LAW.

Merryman v. Bourne, 9 Wall., 592.
U. S. v. Chavez, 159 U. S., 452, 464.

5. THE PRESUMPTION OF TITLE IS IN FAVOR OF THE PLAINTIFF IN THIS CASE.

The possession of the plaintiff is not disputed and the presumption arises under *U. S. R. S., Section 2126*, as follows:

> "In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."

Felix v. Patrick, 36 Fed., 461 (affirmed 145 *U. S.*, 317), held that this section recognized the right of Indians to sue.

6. THE COURTS HAVE REPEATEDLY RECOGNIZED THAT THE NEW MEXICAN PUEBLOS HAVE TITLE, AND BY INFERENCE, THAT THE SIMILAR PAPAGO PUEBLOS HAVE TITLE.

The language of the *Joseph* case, 94 *U. S.*, 614, is strong to this effect, and in this respect the decision has always been approved. The New Mexican cases cited under Point IV below, are to the same effect.

This has been the consistent holding of the Attorney-General's office and of the Department of the Interior. See letter of Acting Secretary to Commissioner of Indian Affairs, June 30, 1894, quoting Attorney-General's opinion, showing that the New Mexican pueblos had a title which was not subject to control of the government. (19 *Decisions of the Department of the Interior relating to Public Lands*, page 326.)

7. THE COMMUNAL TITLE OF INDIAN PUEBLOS, SUCH AS THAT CLAIMED BY THE PLAINTIFF, IS WELL KNOWN TO AND RECOGNIZED BY THE AMERICAN LAW AS WELL AS THE SPANISH LAW.

That it is recognized by the Spanish law is shown by the quotations from the *Laws of the*

Indies above; the title of the Indian pueblos and Indian communities was repeatedly recognized, expressly and by implication.

As to the American courts, it is sufficient to cite the recent case of *United States v. Sandoval*, 231 U. S. 28, where there came in question the communal title of a New Mexican pueblo, a title which, although expressly confirmed by the United States Government, is of the same fundamental character as that claimed by the plaintiff. This Court recognized that the Indians of each pueblo have a fee simple title to the pueblo lands, and that "it is a communal title, no individuals owning any separate tract; in other words the lands are public lands of the pueblo." (p. 48).

The principles of law upon which the plaintiff's title is based are established by the case of Carino against Insular Government of the Philippine Islands, 212 U. S., 449.

This case arose with regard to Philippine aborigines, much lower in the scale of civilization and development, and institutions than are the civilized and agricultural Papago pueblos; and the principles laid down with regard to the Igorrotes apply more strongly to the Papagos. The case was well considered and most of the propositions above mentioned are sufficiently established by the decision.

1. Under the Spanish law prescription ran against the state in favor of the aborigines. The case cites for this proposition Laws of the Indies, Book 4, Title 12, Law 14, mentioned above, and also the Royal Cedula of October 15, 1754 (cited above) which this court translates as follows: "Where such possessors shall not be able to produce title deeds, it shall be sufficient if they shall show that ancient possession, as a valid title by prescription;" and concludes (p. 461):

> "As prescription, even against crown lands, was recognized by the laws of Spain, we see no sufficient reason for hesitating to admit that it was recognized in the Philippines in regard to lands over which Spain had only a paper sovereignty."

2. The Spanish law recognizes the title of the aborigines to land "irrespective of any royal grant." This Court said, pages 459-460:

> "We hesitate to suppose that it was intended to declare every native who had not a paper title a trespasser and to set the claims of all the wilder tribes afloat. * * * It might, perhaps, be proper and sufficient to say that when, as far back as testimony or memory goes, the land has been held by individuals under a claim of private ownership, it will be presumed to have been held in the same way from before the Spanish conquest, and never to have been public land. Certainly in a case like this if there is doubt or ambiguity in the Spanish law we ought to give the applicant the benefit

of the doubt. Whether justice to the natives and the import of the organic act ought not to carry us beyond a subtle examination of ancient texts, or perhaps even beyond the attitude of Spanish law, humane though it was, it is unnecessary to decide. If, in a tacit way it was assumed that the wild tribes of the Philippines were to be dealt with as the power and inclination of the conqueror might dictate, Congress has not yet sanctioned the same course as the proper one "for the benefit of the inhabitants thereof."

"If the applicant's case is to be tried by the law of Spain we do not discover such clear proof that it was bad by that law as to satisfy us that he does not own the land. To begin with, the older decrees and laws cited by the counsel for the plaintiff in error seem to indicate pretty clearly that the natives were recognized as owning some lands, irrespective of any royal grant. In other words, Spain did not assume to convert all the native inhabitants of the Philippines into trespassers or even into tenants at will."

3. In territories acquired by treaty from Spain (such as the Philippines) this Court recognizes the aboriginal and immemorial titles of the natives (members of a "savage tribe that was never brought under the civil or military government of the Spanish crown," p. 458), even though those titles are entirely unconfirmed by any act or deed of our government or the Spanish government (pp. 459 to 461). The plaintiff was an Igorot who, with his ancestors,

had held the land as owners for more than fifty years and as far back as the findings go, living upon it and maintaining fences sufficient for cattle, and cultivating part and using part for pasturing cattle; and they had held the land in "accordance with Igorot custom." "No document of title, however, had issue from the Spanish crown" although he had repeatedly made application for one (p. 456). The Court presumes that "when as far back as testimony or memory goes, the land has been held by individuals under a claim of private ownership" it was so held before the Spanish conquest and was never public land; and it says that the decrees and laws "indicate pretty clearly that the natives were recognized as owning some land irrespective of any royal grant" (p. 460). Accordingly although both Spain and the United States had refused to grant or confirm the plaintiff's title, this Court held that

> "Upon a consideration of the whole case, we are of opinion that the law and justice require that the applicant should be granted what he seeks (the registration of his immemorial aboriginal title) and should not be deprived of what by the practice and belief of those among whom he lives, was his property, through a refined interpretation of an almost forgotten law of Spain" (p. 463).

The Court mentions *Laws of the Indies*, Book 4, Title 12, Law 14 (above quoted), and says:

> "The fact was that titles were admitted to exist that owed nothing to the powers of Spain beyond this recognition in their books."

4. As regards aboriginal titles, there is a fundamental difference between territory originally acquired or settled, and territory acquired from Spain by treaty.

> "The acquisition of the Philippines was not like the settlement of the white race in the United States. Whatever consideration may have been shown to the North American Indians, the dominant purpose of the whites in America was to occupy the land. It is obvious that, however stated, the reason for our taking over the Philippines was different. No one, we suppose, would deny that, so far as consistent with paramount necessities, our first object in the internal administration of the Islands is to do justice to the natives, not to exploit their country for private gain" (p. 458).

The wording of the treaty of Guadalupe Hidalgo and the circumstances of the case show that the same arguments apply in our case and that the purchase of Southern Arizona from Spain was similar in purpose and in effect on titles to the purchase of the Philippines from Spain.

5. In a case like ours "every presumption is and ought to be against the government" and "certainly in a case like this, if there is doubt or ambiguity in the Spanish law, we ought to give the applicant the benefit of the doubt" (p. 460).

It appears from the Century Dictionary that the Igorots are much less civilized than the Papagos, and if the former are not to be classed with the wild North American Indians, certainly the Papagos can not be so classed.

> "Igorrotes 1. A member of one of the tribes, speaking the Igorrote language, including the Igorrotes proper, the Buriks and the Busaos.
>
> 2. In a generalized sense a member of one of the uncivilized tribes of North Luzon until recently known as head hunters; also rarely used to designate those of Central Luzon and Mindanao.
>
> 3. In local Philippine usage, a savage, a pagan native."

We submit that the Carino case is conclusive as to all questions of native title which arise in our case.

POINT III.

The claim of the Pueblo of Santa Rosa is not barred by failure to assert the same before the Court of Private Land Claims or before Land Commissioners.

The Government may argue that under the *Botiller case in* 130 *U. S.*, 238, and the *Barker* case, 181 *U. S.*, 481, our claim is extinguished because not presented. But those cases are under the act regarding California. But it has been repeatedly held that the California Act and the cases above mentioned have no application to Arizona titles, because under the Arizona statutes (different from the California statute) it was not necessary to present or procure confirmation or recognition of consummated titles, but only of titles which were unconsummated and rested in contract or equity.

Our title was complete and consummated before the cession and the following cases show that such titles require no confirmation and are not barred by failure to present to the Court of Private Land Claims.

Ainsa v. N. M. & Arizona R. R. Co., 175 *U. S.*, 76, saying:

> "A grant of land in New Mexico which was complete and perfect before the cession of New Mexico to the United States, is in the same position as was a like grant in Louisiana or in Florida, and is not in the

position of one under the peculiar Acts of Congress in relation to California; and may be asserted, as against any adverse private claimant, in the ordinary courts of justice" (p. 90).

"And it was accordingly held that a Spanish grant which was complete before the date mentioned in the Treaty *was confirmed by the Treaty itself, needed no confirmation by Congress*, and was not impaired by its rejection by the Commissioners appointed by the President under authority of Congress to examine claims to land in Florida" (p. 82. Referring to *U. S. v. Percheman*, 7 Pet., 51).

Richardson v. Ainsa, 218 *U. S.*, 289, saying:

"But the considerations mentioned in the case cited (*Botiller v. Dominguez*) did not prevent the United States, in the Act of March 3, 1891, from leaving the holders of perfected titles free not to present them to the court as they were required to do in earlier statutes. The good faith of the United States was pledged to respect Mexican titles. It recognized, in the Act of 1891, that holders of such titles need not go into the land claims court to get them confirmed, and we should be slow to suppose that it meant to make a doubt in the Department of Justice as to the validity of a perfect title a ground for cutting down what otherwise was bound to protect and did by statute leave intact."

Our right is a right paramount to the right of the United States, such as was discussed in the *Barker* case, 181 *U. S.*, 481, 492.

POINT IV.

The character and titles of the Papagos and their Pueblos, including Santa Rosa, are established by certain interesting and important cases in the New Mexican Territorial courts, which, although decided with regard to New Mexican Pueblos, apply equally to the similar Papago Pueblos.

We take the liberty of quoting rather fully from these cases because of their weight and importance.

United States v. Lucero, 1 *N. M.*, 422.

This was a prosecution for a violation of the *Non-Intercourse Act* of 1834. It was held that the Pueblo Indians of New Mexico did not come within the provisions of this act because they were not tribal Indians. Their characteristics, history, tenure of their lands and political status are carfully examined by the court in this case. In the course of its opinion the court said:

> (p. 427). "The theory, promulgated by some, and believed by many, that the Spanish adventurers found the pueblo Indians of New Mexico a wild, savage and barbarous race; that they conquered them and reduced them to subjection, placed them in villages, and taught them the arts of civilized life, is a pure and unadulterated fiction and contradicted by the uniform history of the Spanish adventurers for over two hundred years. They found the Pueblo

Indians, on their advent into New Mexico, a peaceful, quiet and industrious people, residing in villages for their protection against the wild Indians, and living by the cultivation of the soil. Their villages are described, their locality mentioned, their habits and pursuits delineated, and we learn that the old palace, not one hundred feet from where we are now holding court, was built upon the site of one of their ancient towns. That the Spanish placed them under subjection, treated them with cruelty, but planted the Catholic religion among them, and an improved civilization, is true; but they found them civilized, peaceful and kind, and on that account they became an easy victim of their cupidity and despotic rule. This condition of domineering on the part of the Spaniards and meek obedience on the part of the Pueblo Indians, continued until 1670, when the Pueblo Indians rebelled against their Spanish masters, and expelled them all from New Mexico. It was not until 1688 that the Spaniards obtained sufficient force to conquer, subdue and chastise them. At the date of 1689, and within a few years subsequent, was executed to the various pueblos of New Mexico their titles to their lands. The Spaniards acknowledged their title to the land on which they were residing, and had resided time whereof the memory of man runneth not to the contrary, and a written agreement was executed and delivered to them; and so long as the Spanish rule was continued in America, these titles were respected. Upon the establishment of the independence of Mexico from old Spain, these titles continued to be respected, and the government of the United States in the

treaty of Guadalupe Hidalgo pledged her faith as a nation to maintain and respect them. When the Republic of Mexico was compelled by the chances of unsuccessful war to part with a portion of her territory and people, she threw around them by treaty all the safeguards to their civil, religious and political rights arising out of honor among men and faith among nations.

* * * * * * *

(p. 429). "Let us now pass to the consideration of the status of the Indian Pueblo of Cochiti and its people as to the Republic of Mexico, and the title by which they held their land at the date of said treaty in 1848, when they passed out of the sovereignty of the Republic of Mexico, and came under the sovereignty of the United States. Were the Pueblo Indians of New Mexico, at the date of the treaty of Guadaloupe Hidalgo, citizens of the Republic of Mexico, and as such entitled to all the protection and benefit of all articles in said treaty, made for the protection of the Mexicans?

* * * * * * *

(p. 430). "The Indians, as they were called of Mexico on account of their numbers, their courage, their patriotism, rendered easy the overthrow of the unjust, arbitrary and partial rule of the viceroys of Spain, and they established upon its ruins the empire of Iturbide, their successful leader. The Spanish scholar will not fail to remember that when Spanish law books and Spanish legislators speak of Indians they mean that civilized race of people who live in towns and cultivate the soil, and are often mentined as *naturales* and *pueblos*, natives of the towns, and as *Indios del*

pueblos, Indians of the towns; and for the other distinct and separate class of Indians whose daily occupation was war, robbery and theft carried on against the Pueblo Indians, as well as the Spaniards, the term savages (*salvajes*) or barbarous Indians (*Indios barbaros*) was the expression used.

* * * * * * *

(p. 431). "When the term Indian is used in our acts of congress, it means that savage and roaming race of red men given to war and the chase for a living, and wholly ignorant of the pursuits of civilized man, for the simple reason that when those laws had been enacted, no such class of Indians as the Pueblo Indians of New Mexico existed within the existing limits of the United States.

"Neither the Spanish crown, its viceroys in the new world, nor the Mexican Republic ever legislated for the savage class of Indians.

* * * * * * *

(p. 432). "It will thus be seen that the Indian race of Mexico, and that portion, and a vast portion, of the inhabitants to whom that term was properly applicable, were recognized as citizens of the Republic of Mexico, in all her plans of government and acts of solemn obligation putting into practical operation that plan.

* * * * * * *

(p. 434). "The Pueblo Indians of New Mexico thus being, at the date of the treaty of Guadalupe Hidalgo, Mexican citizens, they were, by the sixth article of that treaty, made citizens of the United States, inasmuch as not one of them elected 'to retain title and rights of Mexican citizens, but

acquired under that treaty those of citizens of the United States.'

* * * * * * *

"The title of the pueblo of Cochiti was founded in first discovery and occupancy, time whereof the memory of man runneth not to the contrary. The pueblo of Cochiti needed nothing from the King of Spain or his viceroys, nothing from the republic of Mexico or the treaty of Guadaloupe Hidalgo, or acts of the American Congress, to add to the validity of a title to land occupied and cultivated for three hundred years. * * * It has been repeatedly decided by the Supreme Court that a perfect title under the laws of Spain at the time of the change of sovereignty needed no sanction from the legislative or judicial departments of the country. See *United States v. Wiggins*, 14 Pet., 334; *United States v. Kingsley*, 12 Id., 476; *Chouteau v. Eckhart*, 2 How., 348.

"The right of property in the pueblo of Cochiti to the lands granted to them in 1689, was not affected in any manner by the change of sovereignty, as has been repeatedly settled by the Supreme Court, in the case of paper title such as this: See *United States v. Percheman*, 7 Pet., 51; *American Insurance Company v. Canter*, 1 Id., 511; *Strother v. Lucas*, 12 Id., 410.

"It will be thus seen that the title of Cochiti was a perfect title, capable of being asserted in any court."

United States v. Varela, 1 N. M., 593.

This was a suit for a penalty under the *Non-Intercourse Act* of 1834. The Court determined

that the legislation directed against settling on Indian lands did not apply to the pueblo Indians. The Court said (p. 598):

> "Pueblo, as defined in the Spanish language signifies inhabited town or village, and in the plural is used to designate either towns or the inhabitants of towns. As applied to these Indian communities it is significantly descriptive of a race and their habitations, which plainly distinguishes them from the nomadic tribes in their habits; as thus applied it has a popular and well-defined signification in New Mexico. In construing the language of the declaration, is it not proper to apply that signification?
>
> "It is claimed that the term 'Indian tribe,' without other qualifying words, in its ordinary acceptation signifies a tribe between whom and the general government subsist all the relations I have pointed out, which exist between the government and the tribes occupying what in the statute is technically designated as 'Indian country.' Would it not be just as consistent to claim that a pueblo tribe of Indians of a pueblo, in the ordinary acceptation of that phrase, signifies a community living in permanent habitations, constituting a town, subsisting by their own industry in the cultivation of the soil and other branches of husbandry, and carrying on trade and general intercourse with the people of the territory, precisely as do the inhabitants of any Spanish or Mexican town? These are certainly among the distinguishing characteristics of pueblos as commonly understood among the people of New Mexico. To communities with habits such as these, of long standing,

> I apprehend the Courts would meet with grave embarrassments in attempting to apply the penal non-intercourse laws of the United States, in like manner as to nomadic tribes of the 'Indian country.' "

The judgment in this case was affirmed by this Court in *United States v. Joseph,* 94 U. S., 614, 618, where the Court said:

> "Turning our attention to the tenure by which these communities hold the land on which the settlement of defendant was made, we find that it is wholly different from that of the Indian tribes to whom the act of Congress applies. The United States have not recognized in these latter any other than a passing title with right of use until by treaty or otherwise that right is extinguished. And the ultimate title has been always held to be in the United States, with no right in the Indians to transfer it, or even their possession, without consent of the government. * * * It is this fixed claim of dominion which lies at the foundation of the act forbidding the white man to make a settlement on the lands occupied by an Indian tribe. * * * The pueblo Indians, on the contrary, hold their lands by a right superior to that of the United States. Their title dates back to grants made by the government of Spain before the Mexican revolution, a title which was fully recognized by the Mexican government, and protected by it in the treaty of Guadaloupe Hidalgo, by which this country and the allegiance of its inhabitants were transferred to the United States."

The Territory of New Mexico v. Delinquent Taxpayers, 12 New Mexico, 139. In this case the question of the taxability of the Pueblo Indians in New Mexico was before the Court. The Court determined that the Pueblo Indians were citizens of the United States, held title to their lands with full power of alienation, and that the lands of the Indian Pueblos in New Mexico are taxable. The Court said:

> "The single question presented by this record is as to whether the lands of the Pueblo Indians are taxable.
>
> "It would be an inviting task to trace the history of these people since the advent of the Spanish conquerors; but, as this Court has, in a very interesting opinion, dealt with this subject, we content ourselves with reference thereto. *U. S. v. Lucero*, 1 N. Mex., 422.
>
> "They were found a peaceful, industrious and civilized people, living in towns (pueblos) and following agricultural and pastoral pursuits. In 1689, and within a few years subsequent, the Spanish government granted them their lands. So long as they remained under the Spanish rule certain restrictions were placed upon the alienation of their property. Hall's Mexican Law, Secs. 160 and 161. As late as March 13, 1811, they were exempted from taxation. Hall's Mexican Law, Sec. 169. They seem to have been considered by the Spanish as wards of the government and entitled to special privileges and protection.
>
> "But a complete change took place in the status of these people when Mexico threw off the Spanish yoke. Among those en-

gaged in that struggle for independence, this Aztec race far outnumbered the Mexicans and its success was due in a large measure to their efforts. It was but natural and fitting that in the formation of the new government they should take a prominent, if not a leading part, and that they should be placed upon an equal footing as to all civil and political rights. And so we find that the revolutionary government of Mexico, February 24, 1821, a short time before the subversion of Spanish power, adopted what is known as 'The Plan of Iguala' (Iguala was the place of the revolutionary army headquarters), in which it is declared that: 'All the inhabitants of New Spain, without distinction, whether Europeans, Africans or Indians, are citizens of this monarchy, with the right to be employed in any post, according to their merit and virtues;' and that: 'The person and property of every citizen will be respected and protected by the government.' 1 *Ordenes y Decretors*, by Galvan, page 3; *U. S. v. Ritchie*, 17 How. (U. S.), 524, 538; *U. S. v. Lucero, supra.*

"The same principles were reaffirmed in the Treaty of Cordova, of August 24, 1821. 1 *Ordenes y Decretos*, by Galvan, page 6, and in the Declaration of Independence, of October 6, 1821. Id., page 8.

* * * * * * *

"We had then, at the date of the Treaty of Guadalupe Hidalgo, whereby we acquired this territory, a people possessed of all the powers, privileges and immunities of any other citizens of Mexico, and they came to us so endowed as much as any other class of citizens. This, necessarily,

and independent of the provisions of the Treaty of Guadalupe Hidalgo, which so carefully guards the civil rights of all Mexican citizens within the ceded territory, carried with it the right to take, hold and dispose of their property.

* * * * * * *

"The Supreme Court of the United States in *United States v. Joseph*, 94 U. S., 618, in passing upon the nature of the title of these Indians, says:

" 'The Pueblo Indians, on the contrary, hold their lands by right superior to the United States. Their title dates back to grants made by the government of Spain before the Mexican revolution—a title which was fully recognized by the Mexican government, and protected by it in the Treaty of Guadalupe Hidalgo, by which this country and the allegiance of the inhabitants were transferred to the United States.'

* * * * * * *

"It is a matter of history, gathered by the writer from conversations with early residents of the country, that these people were, after the Treaty of Guadalupe Hidalgo and down to the organization of the territory, and perhaps down to the act of 1854, *supra*, regarded by the people as citizens, and as possessed of all the rights of the same. They are reported to have participated in elections, and held office in Pena Blanca and other places in the territory. They sat as grand and petit jurors in the same country of Bernalillo, while Judge H. S. Johnson presided over the same, at one term of court at least.

"We conclude, therefore, that the Pueblo Indians of New Mexico are citizens of New Mexico and of the United States, hold their

lands with full power of alienation, and are, as such, subject to taxation."

POINT V.

The Pueblo Indians were citizens of Mexico at the time of the cession, and having elected to remain in the United States, they are now, under the treaty, citizens of the United States.

That all Indians were made full citizens of Mexico after the separation from Spain is beyond question.

Plan de Iguala ("Mexico," by Brantz Mayer, former Secretary of the Legation to Mexico, 1854, p. 128.)

ARTICLE XI.

"All the inhabitants are citizens and equal and the door of advancement is open to virtue and merit."

The first Mexican Congress which adopted the Plan of Iguala passed the following statute on February 24, 1822 (*Decrees and Orders of the first Mexican Congress*):

"The sovereign Congress decrees the equality of civil rights to all the free inhabitants of the empire, whatever may be their origin, in the four quarters of the earth."

The Mexican decree of May 18, 1847 (*Reynold's Spanish and Mexican Land Laws*, 282), as to constitutional reformation, provided:

ARTICLE I.

"Every Mexican by birth or naturalization who has attained the age of twenty years, who has an honest means of living and who has not been sentenced in legal prosecution to any infamous penalty is a citizen of the United States of Mexico."

U. S. v. Ritchie, 17 How., 525, 541, held that the Indians were Mexican citizens at the time of the Gadsden Purchase.

> "These solemn declarations of the political power of the (Mexican) government had the effect, necessarily, to invest the Indians with the privileges of citizenship as effectually as had the Declaration of Independence of the United States of 1776 to invest all those persons with these privileges residing in the country at the time, and who adhered to the interests of the colonies.
>
> "The plan of Iguala, adopted by the revolutionary government of Mexico, in 1821, and all the successive public documents and decrees of that country, recognized an equality amongst all the inhabitants, whether Europeans, Africans, or Indians; and the decree of 1824, providing for colonization, recognized the citizenship of the Indians, and the right to hold land." (Head Note.)

U. S. v. Joseph, 94 U. S., 614, held that the Pueblo Indians had from the Mexican government full recognition "of all their civil rights, including that of voting and holding office."

The treaty provisions quoted above prove that all Mexican citizens who elected to stay in the

United States should become American citizens, and it must accordingly be that the Papago Indians are now American citizens—and the following case is authority for that proposition, for although decided with reference to New Mexican Pueblo Indians, there can be no distinction.

U. S. v. Lucero (on appeal to the Supreme Court of New Mexico), 1 *N. M.*, 422, 425.

POINT VI.

The Papagos are different in every respect from the North American tribes and similar to the civilized North American Pueblo Indians.

The Government's argument is based on the proposition that the Papagos are like the North American Indians and that the law can recognize no distinction. But the difference is fundamental and has been and must be recognized by the Court.

PAPAGO PUEBLO INDIANS.	NORTH AMERICAN TRIBAL INDIANS.
Living by agriculture, and cattle raising, sedentary and permanent within permanent village boundaries.	Roving within extensive national boundaries.

Peaceful, industrious, frugal and moral.	Warlike, lazy, cruel and bloodthirsty.
Loyal to Spanish government and law-abiding.	Hostile, treacherous and unloyal.
Civilized. Living in organized and permanent villages with annual elections and local village name.	Uncivilized. Living in loose, wandering and shifting tribes with no name except for the tribe or nation.
Living in permanent, substantial houses with valuable improvements, including deep wells made by themselves.	Living in tents.
Mixing and trading freely with whites.	Living in isolation.
Self-governed under local laws.	Incapable of self-government.
Claiming and exercising rights of ownership over real property, by cultivating, improving and using for pasturage within certain and permanent boundaries.	Making no use of real property except for hunting.

PAPAGO PUEBLO INDIANS.	NORTH AMERICAN TRIBAL INDIANS.
Exclusively occupying real property so as to establish title by prescription.	Not occupying real property in a legal sense.
Holding title to real property by decree or grant of Spanish government, preservation by treaty and paramount to title of United States.	Having no title or right of occupancy from any government, but only immemorial occupancy subject to whites' rights of discovery and conquest.
Having the power to convey good title as repeatedly held by our courts.	Having no power whatever to convey good title as is held by our courts.
Protected in personal property and political rights by the Mexican treaties.	Entirely unprotected by Mexican treaties.
Called by the Spaniards "indios de pueblo."	Called by the Spaniards "indios barbaros."

The local statutes have recognized the distinction as they must. The territorial statute of New Mexico of January 10, 1853 (*Pamphlet*, p. 29), prohibited selling of liquor to Indians, but provided that "Pueblo Indians living among us are not included in the word 'Indians,' and the New Mexican law of July 12, 1851, provided for the enforcement of the United States Non-inter-

course Laws with 'savage Indian tribes.' The Arizona territorial statute of December 15, 1868, prohibited selling arms to Indians, but provided that the act should not apply to Pimas, Maricopas, Papagos and tame Apaches."

The usage at the time classed the Papagos together with the New Mexican pueblos as Pueblo Indians.

These distinctions are recognized by the cases. Under "Point IV" above, quoted from the New Mexican territorial decisions showing the broad distinction between Pueblo Indians and wild Indians, and these distinctions were recognized by this Court in

U. S. v. Joseph, 94 U. S. 614, which shows the peaceful and civilized character of the Pueblos and says that in 1834 "there were no such Indians as these in the United States unless it be one or two reservations or tribes such as the Senecas or Oneidas of New York."

> "When it became necessary to extend the laws regulating intercourse with the Indians over our new acquisitions from Mexico, there was ample room for the exercise of those laws among the nomadic Apaches, Comanches, Navajoes, and other tribes whose incapacity for self government required both for themselves and for the citizens of the country this guardian care of the general government.
>
> "The Pueblo Indians, if indeed they can be called Indians, had nothing in common

with this class. The degree of civilization which they had attained centuries before, their willing submission to all the laws of the Mexican government, the full recognition by that government of all their civil rights, including that of voting and holding office, and their absorption into the general mass of the population (except that they held their lands in common), all forbid the idea that they should be classed with the Indian tribes for whom the intercourse acts were made, or that in the intent of the act of 1851 its provisions were applicable to them. The tribes for whom the act of 1834 was made were those semi-independent tribes whom our government has always recognized as exempt from our laws, whether within or without the limits of an organized State or Territory, and in regard to their domestic government, left to their own rules and traditions; in whom we have recognized the capacity to make treaties, and with whom the governments, state and national, deal, with a few exceptions only, in their national or tribal character, and not as individuals.

"Turning our attention to the tenure by which these communities hold the land on which the settlement of defendant was made, we find that it is wholly different from that of the Indian tribes to whom the Act of Congress applies. The United States have not recognized in these latter any other than a passing title with right of use, until by treaty or otherwise that right is extinguished. And in the United States, with no right in the Indians to transfer it, or even their possession, without consent of the government.

> "It is this fixed claim of dominion which lies at the foundation of the act forbidding the white man to make a settlement on the lands occupied by an Indian tribe.
>
> "The Pueblo Indians, on the contrary, hold their lands by a right superior to that of the United States. Their title dates back to grants made by the government of Spain before the Mexican revolution—a title which was fully recognized by the Mexican government, and protected by it in the treaty of Guadalupe Hidalgo, by which this country and the allegiance of its inhabitants were transferred to the United States."

Our adversaries attempt to weaken the force of the Joseph case, but this is impossible. That case was a decision which was based upon the fundamental differences between Pueblo Indians and the Northern tribal Indians and although the statute under consideration is not now in question, nevertheless the same differences which determined the construction and application of that statute are vitally important in this case. The *Sandoval* case (231 U. S., 28) is in no way inconsistent with either the decision or the language of the Joseph case, except that in the latter case this court considers that some of the statements regarding Pueblo Indians in the Joseph case are at variance with later data—and even as to that it is apparent that the attorney for Sandoval did not attempt to put before the court fully the character of the Indians, leaving the court to the one-sided view given by the

quotations read by the government. The case came up on demurrer so that there was no testimony regarding their character.

Moreover the *Sandoval* case itself shows that there are broad and important distinctions between the Pueblo Indians and tribal Indians; and indeed many of the differences above stated are fully justified by the *Sandoval* case.

That case was regarding the extent of police power over pueblos and the court founded its decision very largely upon the theory that long continued executive and congressional action justified the police power; there is no such congressional or executive action with regard to Santa Rosa.

Jaeger v. U. S. & The Yuma Indians, 29 Court of Claims, 172, is another case decided upon the distinction between the tribal Indians and Indians like the New Mexican Pueblos; under the Depredation Statute the plaintiff tried to get compensation for damages caused by the Yumas and because of the character of the Yumas, being the same as the New Mexican Pueblos, it was held that the statute did not apply to the Yumas.

POINT VII.

Indian wardship has nothing to do with this case.

The Doctrine of Indian Wardship.

So far as concerns the wild Indians, occupying lands discovered or conquered by the English, this doctrine is old and well established. It is based upon the character of the wild Indians and the character of their use and enjoyment of the land, their inability to govern themselves and the fact of the discovery and conquest of the country by a superior race, and the courts, viewing and enforcing the action of Congress regarding these dependent peoples and the provision of the constitution giving Congress power to legislate regarding Indian tribes, have said that the wild Indians and wild Indian tribes are in a sense the wards of the nation. Even with regard to wild Indians, this is a very narrow and restricted sense; this wardship means only that Congress may and should protect the wild Indians by legislation, prohibiting the sale of liquor in Indian territory, protecting them from the whites, providing for their places of residence within limits and in some cases regulating their power of managing and conveying their property.

With regard to the New Mexican pueblos and other civilized agricultural Indians on *purchased*

territory in the southwest, the case is quite different; the facts on which the so-called wardship of the wild Indians is based are for the most part absent with the civilized Pueblo Indians, and Congress has only in rare instances legislated for their protection.

Obviously the fact that the wild Indians are wards is no reason for saying that the civilized Indians are wards. Congress must decide in every case whether any particular Indians are wards of the nation and the character and extent of the wardship; as the Sandoval case (231 U. S. 28) well says:

> "In respect of distinctly Indian communities, the questions whether, to what extent, and for what time they shall be recognized and dealt with, as dependent tribes requiring the guardianship and protection of the United States, *are to be determined by Congress and not by the Courts.*"

Naturally, and we think correctly, both this court and the lower courts held that the civilized pueblos are not wards of the nation and are not subject to Congressional restrictions, until the Sandoval case was decided in February, 1913. That case decided that the New Mexican pueblos *are* wards of the nation in the sense that Congress, under the constitution, has the right to pass a statute prohibiting the sale of liquor to them, and it must still be determined what are the limits of this wardship; the fact that the

Sandoval case holds that the Pueblo Indians are subject to Congressional liquor legislation does not indicate that they are subject to every kind of Congressional Indian legislation which has been upheld with regard to wild Indians. For every case depends upon its own facts and the Sandoval case decided nothing except that Congress could prohibit the sale of liquor among the New Mexican pueblos.

Indian wardship is not a status or a disability; it means simply that Indians are subject within limits to the power of Congress to pass protective and restrictive legislation.

"Wardship" is an unfortunate and misleading term, for it reminds us too much of the status and disabilities of the ward who is under guardianship at common law. The true analogy is rather that of interstate commerce, which under the constitution is subject to regulation by Congress, but is absolutely free until Congress does act; or the analogy of women, who under the police power are subject to legislative regulation of their hours of labor but are not under any restriction or disability until the legislature acts.

That Indians are wards only in this Pickwickian sense is clear from all the cases, but it is sufficient to mention the Sandoval case which is the latest case on wardship and the only case on the wardship of Pueblo Indians. This case well describes the doctrine as "the power and

duty of exercising a fostering care and protection over all dependent Indian communities within its borders" (p. 46).

Unless and until Congress acts, Indians and Indian communities are absolutely free and unrestricted in person and property.

This so-called guardianship simply means that Congress has the power to protect and to restrict in order to protect; it is a congressional power and not a power in the courts and obviously until Congress exercises the power, there is no restriction. No disability results from the mere existence of the power in Congress; disabilities can only come from the exercise of the power.

It must be remembered that Congress alone can exercise these guardianship powers. Neither the President nor the Secretary of the Interior or the Indian Commissioner or all together can interfere with the Indian or his property except as authorized by Congress. The power of Congress to restrict does not give the executive branch the power to restrict or to interfere.

And even legislation by Congress is always subject to review in the courts as to its constitutionality; this is a limited constitutional power.

If the Papago pueblos are wards of the nation that fact does not, and can not, concern this case.

Assuming that Congress can impose some restriction or disability upon the plaintiff pueblo

or upon its rights in its lands or its right to alienate its lands, there is no pretense that any such disability *has been* imposed or that any act of Congress to that end *has been* passed. The executive orders creating reservations in the Papago country and the congressional appropriations for wells, etc., are unimportant.

And even if it were true (which it is not) that by act of Congress or by mere fact of wardship, some disability has resulted to the plaintiff with respect to the management or alienation of its lands, such disability could not affect this case; for it would still be true that the plaintiff owns its lands and has the right to come to court for protection against aggression.

That an Indian community may own land even though it is a ward of the nation is proved by the Sandoval case, for the court stated that it was true that the Indians have a communal title "in fee simple," and it nevertheless held that in certain matters the New Mexican pueblos are subject to congressional legislation. The two ideas are quite consistent.

In the same way the fact that an Indian community is a ward does not impair its corporate character or its right to sue. The courts have repeatedly allowed New Mexican pueblos to sue and be sued without the consent of the United States; and in *U. S. v. Joseph*, 94 U. S. 614, this court said that the pueblos can bring suit for the

protection of their rights. Again in *U. S. v. Conway*, 175 U. S. 60, it appeared that in a proceeding in the Court of Private Land Claims "upon motion made by the government upon the consent of all the parties to the proceeding it was ordered on October 11, 1895, that these pueblos (the Pueblos of Nambe and Pojoaque) be made parties and that the petition of the claimant be deemed amended accordingly," showing clearly that the officers of the government considered that these Pueblos had capacity to be sued.

Even with regard to wild Indians, who have always been considered wards of the nation, the courts have always held that Indians have capacity to sue when any Federal question is involved.

Re Kansas Indians, 72 U. S. 737.

Cherokee Nation v. Hitchcock, 187 U. S. 294.

Felix v. Patrick, 36 Fed. 461 (affirmed 145 U. S. 317).

In short, the doctrine of wardship is important for the protection of the Indians but it does not concern the appellee because it is simply a matter of power to protect by congressional legislation and in the absence of such legislation the mere existence of the power does not affect either the corporate character or the land titles of the appellee.

POINT VIII.

The Papago Reservation order of January 14, 1916, is irrelevant and unimportant except as being in the nature of a further assertion of title by the government and further aggression by the government upon the plaintiff's rights, pending the determination of those rights in this court.

The facts are:

1. This presidential order set aside the territory indicated on the photographic map for the use of the Papago Indians, including within its boundaries the plaintiff's villages and its village lands, which lie at about the center of the reservation. Roughly calculated, the territory included in the new reservation amounts to about 4,700 square miles or 3,000,000 acres; and as the total number of Papagos, men, women and children, is, according to the Hand Book of American Indians, only about 2,225, apart from the allotees on the San Xavier reservation (not included in the new reservation) and also excluding 2,233 on the Gila Bend reservation, this executive action stands as a governmental recognition of the fact that in order to make a living in this desert country, the Papagos need the use of about 1,300 acres for each man, woman and child. In the light of this admission it is not surprising that Santa Rosa, the largest and most

important of the Papago pueblos, comprising several hundred Papagos, has immemorially owned and occupied and used and now claims about 400,000 acres.

2. This executive order increases the danger of aggression from prospectors and miners, and this danger is greater than from homestead settlers. The order does not give the Indians the use of the mineral rights or withdraw those rights from entry, and it in effect invites miners to enter and occupy. Moreover the order indicates that the defendant, the Secretary of the Interior, will assume control of all the land within the boundaries as being all Indian reservation land, and thus it constitutes a clear threat of aggression.

3. Moreover the making of the order and the publication of the map is a clear and offensive assertion by the government that all the land within the boundaries is public land and subject to public disposition at the will of the President, and a clear denial of the Indians' titles. In short, it is a cloud upon the plaintiff's title to this land and most harmful to the plaintiff. It is true that the order expressly provides that the order and the reservation shall not affect any private rights and that the power to make Indian reservations does not extend beyond public lands and that a reservation order can not in point of

law affect land privately owned; but nevertheless the publication of this official map, including within its boundaries the plaintiff's great tract of land, is in effect an assertion that the Santa Rosa lands are public lands and a most injurious cloud upon the Santa Rosa titles.

4. It may be true that this great reservation was established in pursuance of the policy followed concerning the New Mexico pueblos, where the government has supplemented the communal pueblo lands by creating around those lands a governmental reservation which serves the double purpose of giving the Pueblo Indians a larger territory for grazing and cultivation (the aggregate territory in the case of the Zuni pueblo being 215,000 acres) and of keeping the whites at a distance. But if this be the purpose of the government, it should in fairness to the Indians have done more; it should have excluded miners and it should, by the wording of the order, have recognized the Indian titles instead of denying them and should have shown, as in the case of the New Mexico pueblos, that the reservation was supplemental to the private holdings of the Indians. If this reservation is a belated recognition by the government of the Papagos' rights and interests, after seventy years of neglect, let the government go further and ensure the prosperity and happiness of the

Papagos forever by recognizing fully and at once their immemorial land titles which were recognized by the Spanish and Mexican governments. If on the other hand this action is only to hold the territory *in statu quo* until the result of this suit, let the government say so frankly.

5. The history of Indian reservations proves that this reservation will not protect the Papagos against the land greed of white men. As soon as the whites want the land and marshal political influence to that end, the reservation order will certainly be attacked and under some later administration it will be modified as suddenly as it was made, and the land will be sold to white men. The only possible protection for the Papago Indians is a land title recognized by the courts; this is the only thing which will make them secure against private greed and political attack.

The Court will take judicial notice of the fact that the old Indian reservation policy—that is, the policy of supporting the Indians upon governmental reservations, as dependents, under the charge of Indian agents—has been a shameful failure, that it has only resulted in degrading, pauperizing and decimating the Indians, that it is condemned by all friends of the Indians and that the government is abandoning it as rapidly as possible.

The Lake Mohonk Conference on the Indian and other dependent peoples in 1895, declared:

> "The reservation system is an insuperable obstacle to civilization and should be abolished."

In 1903 they declared:

> "In dealing with the Indians the objects to be accomplished are no longer questioned; they are the abandonment of the reservation system; the discontinuance of Indian agencies, such education of all Indian children as will fit them for self-support and self-government; access to the courts for the protection of their rights, etc."

H. L. Dawes, formerly Indian Commissioner, Vol. 84 Atlantic Monthly, p. 280, says that less than twenty-five years ago

> "The government turned from the policy of keeping him (the Indian) on reservation as quiet as possible, out of the way of civilization, waiting, with no excess of patience, for the race to fade out of existence and to cease from troubling."

6. If this reservation is established as leading up to the policy of individual allotments under the present statute, it is the beginning of an outrageous wrong upon the Indians. The Indian Allotment Statute as amended provides that wherever Indians are "located upon any reservation created for their use," the President may allot to each Indian 80 acres or in case of pas-

ture land, 160 acres. Allotment Act of February 8, 1887, Sect. 1, as amended by 360 U. S. Stat. at Large, 859 (1910). On this allotment the Indian is expected to live.

The policy is well intended and undoubtedly works admirably with ordinary rich agricultural land, for it gives to the ordinary Indian family, including children, from 160 to 650 acres of land. But with regard to the Papago pueblos, such allotments would be fatal. For under the conditions of the desert country, where the Indians must move from valley to mountain twice a year and must use a large tract of country for grazing, the only system which will enable them to be independent and self-supporting is their present system of communal holdings of a very large tract of land.

The absurdity and wickedness of "allotments" in a desert country were well pointed out by Commissioner Sells at the San Francisco Conference in August, 1915. He said:

> "The use of the term 'surplus land' as applied to Indian reservations sometimes makes me impatient. It too often means that the lands remaining after the Indians of a tribe have been allotted shall be separated from them without sufficiently taking into consideration the fact that many times such allotments are wholly unfit for agricultural purposes, or insufficient to insure a subsistence when no additional provision is made for grazing and stock-raising op-

> portunities. I know of many allotments, depending entirely upon which an Indian family would starve to death, and where no white family could be induced to attempt to make a living, and yet under these circumstances an unsuccessful Indian farmer is apt to be declared a failure. There are thousands of acres of land on Indian reservations where one hundred acres would not feed a rabbit. I suggest that hereafter we photograph the 'Painted Desert' more frequently, and less often the small alfalfa patch on a great reservation. We should at least tell the whole truth. It is prejudicial to the Indian to emphasize the small part of their possessions that are productive and withhold from the public the very large unproductive portion. In this wise it becomes wrongfully understood that they have vast and valuable possessions unused by them which should be otherwise utilized."

Mr. Sells began his address by speaking of the Papagos and he undoubtedly had the Papago country in mind as being a country where "one hundred acres would not feed a rabbit." We quote further from this address at the end of this brief.

7. In any event this order is absolutely irrelevant, for nothing that the government can do pending the decision upon this motion to dismiss the bill of complaint, can affect the case; by making this motion the government admits the allegations of the bill and the appeal must be decided accordingly. And indeed, it is beyond

the power of the President to affect in any way the vested rights and titles of the Pueblo of Santa Rosa.

POINT IX.

The executive orders and legislation regarding the Papagos (apart from the reservation order of January 14, 1916, which is discussed above) are entirely unimportant, both because they are irrelevant to the issues and because they are insignificant in amount and unimportant in character.

The executive orders are unimportant.

1. In the official "Executive Orders relating to Indian Reservations," 1912, comprising 224 pages, the orders affecting the Papagos occupy less than two pages, although the Papago country has belonged to the United States for more than fifty years, and the Papagos have numbered from five to fifteen thousand people and the territory occupied is a principality.

2. There are only four short orders in all, with two or three supplementary orders correcting the boundaries, etc.

3. All but two of these orders were made within three or four years and those two cover reservations distant respectively 60 miles southeast and 75 miles northwest from the village of

Santa Rosa, so that they can have nothing to do with the case.

4. None of the reservations are within 20 miles on the north, 60 miles on the east, 30 miles on the south or 70 miles on the west of Santa Rosa; there has been no executive action or legislation regarding the village or property of Santa Rosa or regarding any property anywhere near it, except the order of January 14, 1916. The so-called Gila Bend reservation (No. 2) and the additions to the Gila River reservation (No. 6) are outside of the distinctive Papago country and concern the Papagos only so far as Papago stragglers might come to them; and the larger part of the reservation (No. 5) is shown by the executive order to be for Maricopas and not Papagos, for the order provides that it is for the use of the "Maricopa Band or Village."

5. All of the later executive orders are very careful to provide that the reservations are subject to all existing rights.

6. All of the reservations except the first two (Nos. 1 and 2) are clearly not reservations in the ordinary sense but are reservations for the help of particular villages and for the protection of their wells. This is shown by their size, which is obviously insufficient for the occupation

and maintenance of any substantial number of families, and also by the wording of the orders.

The later small reservations for the Papagos are similar to those made for the aid or protection of villages of New Mexican Pueblo Indians, which are recognized as municipal corporations, and as owning their lands.

The propriety of proper protection from white settlers, etc., is clear in both cases and it is evident that the government has treated the Papago villages like the New Mexican pueblos. Such reservations for the benefit of New Mexican pueblos are the following:

Jemez Pueblo Reservation, Executive Orders relating to Indian Reservations, p. 124.

Laguna Pueblo Reservation, Executive Orders, p. 125.

Nambe Pueblo Reservation, Executive Orders, p. 126.

San Felipe Pueblo Reservation, Executive Orders, p. 126.

Santa Clara Pueblo Reservation, Executive Orders, p. 127.

Zuni Pueblo Reservation, Executive Orders, p. 129.

It is to be noted that these New Mexican Pueblo reservations contain the same proviso as the later Papago orders, that nothing shall affect existing rights.

The Congressional action is insignificant.

The Trial Court mentions the act of January 1, 1889 (25 U. S. Statutes, 629) granting a right of way over the Papago Indian reservation in *Maricopa County*, which is outside of the Papago country. Another act mentioned is that of August 5, 1882 (22 U. S. Statutes 229), which grants a right of way across the San Xavier reservation *but expressly provides that it shall be subject to the consent of the Indians.* The only other act mentioned (apart from the appropriation acts of 1912 and 1914) is an appropriation for the "farmer in charge of the San Xavier reservation."

This legislation shows no attitude on the part of Congress either toward the Papagos or their villages or their rights.

POINT X.

This suit does not constitute any interference with the administrative functions of the defendants, nor is it a suit against the Government, nor is it an action for trying the title to land.

The law is absolutely settled to the above effect by two cases.

Gauthier v. Morrison, 232 U. S., 452, was a case against the officials of the Land Office, closely like the present, except that Indians were

not involved. The objection was strongly pressed that it was in effect an action against the government to control the discretionary functions of officials, but this Court held that where one has a clear right to land, any government official who attempts to interfere with that right, even though in good faith and apparently in the performance of official duties, is an ordinary wrongdoer and will be restrained by the court as any other individual.

Lane v. Watts, 234 U. S. 525, which arose in the Supreme Court of the District of Columbia and which was also strikingly similar to ours. This Court held (Syllabus):

> "A suit to restrain the Secretary of the Interior and the Land Commissioner from doing under color of their office an illegal act which will cause a cloud upon title of complainant is not one against the United States; nor in this case is it one for recovery of land merely or an attempted appeal from the decision of the Interior Department or a trial of title to land not within the jurisdiction of the court and wherein the United States is not present or sueable."

POINT XI.

This Court, in the exercise of its appellate jurisdiction, has power to make such disposition of this case as justice may at this time require.

> *Watts, Watts and Company, Limited, v. Unione Austriaca Di Navigacione etc.*, decided November 4, 1918, 1 U. S. Supreme Court Advance Opinions 1918-19, page 1.

Justice at this time requires, under all the circumstances of this most remarkable case, that the decree of the Court of Appeals of the District of Columbia be enforced [Transcript, folio 32] in its entirety.

LASTLY.

On all grounds the decision should be for the Indians.

They are worthy people, deserving well of our country. Commissioner Sells knows them well and speaks for them. In his address at a conference held in San Francisco in August, 1915, as appears from a pamphlet sent out by the Indian Bureau, he said:

> "For a long time I have desired to visit the Indians of the Southwest that I might closely study their problems. I have spent the last several weeks among the Apaches, Pimas, Papagos, and the Indians along the

Colorado River. About a week of this time was given to the Papago country. For many reasons I am convinced that the Papago Indians are among the most deserving of any people I have ever known. THEIR HOME FOR MORE THAN TWO HUNDRED YEARS HAS BEEN IN THE DRIEST DESERT OF THE UNITED STATES. NO BRANCH OF THE CAUCASIAN RACE COULD EXIST UNDER SUCH CONDITIONS, AND I DOUBT IF THERE IS ANOTHER INDIAN TRIBE THAT WOULD DO SO. Under these circumstances they have demonstrated that the genius of necessity works out wonderful things. THE PAPAGOS HAVE MADE THEIR STRUGGLE UNASSISTED, AND THEIR ACCOMPLISHMENTS IN VIEW OF THEIR TREMENDOUS OBSTACLES ARE MARVELOUS. Altogether they are entitled to more kindly consideration than they have received, and it is my firm purpose to show the Papagos that we are willing to help those who have so valiantly helped themselves."

To recognize the Indians' community and titles is only fair. A decision for the plaintiff will show the Indians that our nation has fairly fulfilled its obligations—its moral obligations toward the aboriginal owners and rulers of Papagueria, who have done no wrong to the United States and who have come under the power of the United States through no act of theirs—its treaty obligations under the treaties with Mexico whereby the United States agreed with Mexico for the benefit of these peoples to respect their rights and property—its obligation to carry out the promises made to them by

Major Emory in 1847, as shown by our quotation from his report—and its moral obligation of gratitude to a people who have always been peaceful and inoffensive and who, whenever need was, left their fields and flocks and fought for the protection of our citizens against the Apaches.

To recognize the Indians' community and titles is the sensible thing to do. As Commissioner Sells says, these Indians can handle this desert country better than anyone else—much better than the United States Government ever can or will do. They have been studying this job for hundreds of years and they have learned it well: both as a reward for the past and as a prudent thing for the future, they should be confirmed in their ownership of their desert land and then we should help them, if we can, to do their work better. Their own history proves that their own management of the country is successful and the experience of the New Mexican Pueblos proves that if they own their land and are protected by legislation from the whites, their future will be happy.

To recognize the Indians' community and titles is the best possible thing for the Indians. It will insure the preservation, progress and welfare of the Papago Pueblos, and if, on the other hand, their titles are not recognized and the Indians and their country are turned over

to the government, their progressive pauperization, degradation and extermination is certain. Commissioner Sells says that no Caucasian race could have lived in this desert, and no Caucasian government is wise enough to do as well for these desert Indians as they can do for themselves.

To recognize their land titles, including their mineral rights, and their water rights, is to effectively and forever protect the Indians against the encroachment of the whites, assuming that Congress casts about them proper restriction to prevent whites from taking advantage of their ignorance.

To recognize their land titles is to protect the self-respect of the Indians and maintain them as free and self-supporting men; and on this basis a policy of education and intelligent help will make desert Papagueria a prosperous section of our country and will give to the Papago Indians a prosperous and happy future. Any other policy whatever, whether it be the old reservation policy or the policy of breaking up the tribal relations and allotting scraps of land to the Indians individually, will certainly be a failure and a crime against these inoffensive aboriginees. Neither an individual nor a pueblo can progress without self-respect and self-respect can not be preserved unless men are free and self-supporting; the idea of developing men and citizens and

communities by treating them like slaves or children or paupers or dependents has been proved to be, and must necessarily be, absolutely hopeless and impossible.

To recognize their titles is to preserve and develop the simple but entirely adequate civilization of these aboriginal people. It is a civilization which has grown up on the soil, which is appropriate for the situation, which serves the needs of the people themselves and which is fine and worthy in many ways. To destroy this civilization with the heavy hand of government is to do the people a great wrong for it is bred in their bone and a part of their lives; and there is no need to destroy it. In our hours of national self-examination, we blame ourselves because all of our Indian policies have been failures, whereas the Canadians on the one side and the Spanish on the other, instead of degrading their aboriginal peoples, have preserved and developed them. But the whole difference lies simply in this; Spain and Canada have respected the Indians' laws and customs and character and titles, whereas we, except in the case of the Pueblo Indians, have insisted on destroying everything Indian and trying to replace it with what is English, a method both cruel and wholly unsuccessful.

Recognition of the Indians' titles is in conformance with the sound and approved policy of the friends of the Indians. A judgment for the Pueblo of Santa Rosa will put the Papago Indians in the position in which the government and the friends of the Indians are trying to put all Indians,—that is, in the position of self-respecting and self-supporting land owners. It is hard to explain how Secretary Lane, an able and enlightened man, can bring himself to oppose the claims of the Indians in this suit. Apparently he is trying by this suit to have it declared that the Indians are paupers so that by the grace of Congress and as a result of influence brought to bear on Congress by the friends of the Indians, the Papagos may afterward be put back in the very situation in which they have been for hundreds of years; apparently the government is trying to take away their lands for the purpose (we hope) of giving the land back to them.

No one could improve on Commissioner Sells' statement in his Report for 1915 to the Secretary of the Interior, p. 7:

> "Being thoroughly convinced that their material and industrial prosperity is more closely attached to their landed interests, the development of agriculture and stock raising has been given an impetus never before undertaken. * * * Poverty or dependence on others saps the energies of any man. The Indian is no exception, and I have

> placed the greatest work of this office on his material advancement. As his herds increase and his lands produce the Indian becomes better prepared to assimilate the knowledge which comes from the study of books. Love of home and domestic happiness follow as a natural consequence."

This is the parting of the ways for the Papago Pueblo Indians. This Court must decide whether they shall follow the course of the New Mexican Pueblos with their own lands and rights protected by the Courts or whether they shall follow the course of the wild Indians which leads to pauperism and degradation. The defendants, government officials, with the best intentions in the world are attempting to destroy the rights allowed to the Indians by the Spaniards and by the treaties—rights which have been their salvation for the last sixty years and rights which will leave them free and independent for the future—and to assert and exercise rights which they have never claimed against the Papagos and which the law does not give them.

We respectfully submit that the judgment of the Court below must be affirmed.

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Attorneys for Appellee.

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LANE, SECRETARY OF THE INTERIOR, ET AL. *v.* PUEBLO OF SANTA ROSA.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 197. Argued January 29, 1919.—Decided March 3, 1919.

The Pueblo of Santa Rosa is a legal entity, with capacity to maintain a suit to protect its rights in land claimed by it as a grantee under the laws of Spain and Mexico. P. 112. *Cherokee Nation* v. *Georgia*, 5 Pet. 1, distinguished.

This status of the Pueblo, if it did not previously exist, resulted from a law of the Territory of New Mexico, and from acts of Congress extending the laws of that Territory over the region acquired by the Gadsden Treaty, and over the Territory of Arizona, when the latter was organized; and it was not affected by the creation of the State of Arizona. *Id.*

Assuming that these Indians are wards of the Government, that fact would not affect the capacity of the Pueblo to sue in the District of Columbia, to restrain the Secretary of the Interior and the Commissioner of the General Land Office from offering, listing, etc., under the public land laws, lands in Arizona to which the Pueblo alleges perfect title under the laws of Spain and Mexico. P. 113.

In such a suit, where the trial court dismissed the bill on defendants' motion, *held*, error for the Court of Appeals, finding the bill made a case for the relief sought, to award a permanent injunction; for defendants were entitled to answer to the merits as if their motion had been overruled originally. P. 114.

46 App. D. C. 411, reversed.

THE case is stated in the opinion.

The Solicitor General, with whom *Mr. Leslie C. Garnett* was on the brief, for appellants.

Mr. Ralph S. Rounds, with whom *Mr. Alton M. Cates* and *Mr. Henry P. Blair* were on the brief, for appellee.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a suit to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from offering, listing or disposing of certain lands in southern Arizona as public lands of the United States. The lands include the site of the Pueblo of Santa Rosa and the surrounding territory, comprise some 460,000 acres, and are within the region acquired from Mexico under what is known as the Gadsden Treaty, 10 Stat. 1031. The suit is brought by the Pueblo of Santa Rosa and its right to the relief sought is based on two allegations, which are elaborated in the bill: one, that under the laws of Spain and Mexico it had, when that region was acquired by the United States, and under the provisions of the treaty it now has, a complete and perfect title to the lands in question; and the other, that in disregard of its title the defendants are theatening and proceeding to offer, list and dispose of these lands as public lands of the United States. In the court of first instance the bill was challenged by a motion to dismiss in the nature of a demurrer, and the motion was sustained. In the Court of Appeals the case made by the allegations in the bill was held to be one entitling the plaintiff to the relief sought, and the decree of dismissal was reversed with a direction that a permanent injunction be awarded. 46 App. D. C. 411. The latter decision is challenged here on two grounds: one, that the plaintiff is not a legal entity and has no capacity to maintain the suit; and the other, that, in any event, the defendants should not be subjected to a permanent injunction without according them an opportunity to answer the bill.

The plaintiff is an Indian town whose inhabitants are a simple and uninformed people, measurably civilized and industrious, living in substantial houses and engaged in agricultural and pastoral pursuits. Its existence, prac-

tically as it is today, can be traced back through the period of Mexican rule into that of the Spanish Kings. It was known then, as now, as the Pueblo of Santa Rosa, and its inhabitants were known then, as now, as Pueblo Indians. During the Spanish, as also the Mexican, dominion it enjoyed a large measure of local self-government and was recognized as having capacity to acquire and hold lands and other property. With much reason this might be regarded as enabling and entitling it to become a suitor for the purpose of enforcing or defending its property interests. See *School District* v. *Wood*, 13 Massachusetts, 193, 198; Cooley's Const. Lim., 7th ed., p. 276; 1 Dillon Munic. Corp., 5th ed., §§ 50, 64, 65. But our decision need not be put on that ground, for there is another which arises out of our own laws and is in itself sufficient. After the Gadsden Treaty Congress made that region part of the Territory of New Mexico and subjected it to "all the laws" of that Territory. Act August 4, 1854, c. 245, 10 Stat. 575. One of those laws provided that the inhabitants of any Indian pueblo having a grant or concession of lands from Spain or Mexico, such as is here claimed, should be a body corporate and as such capable of suing or defending in respect of such lands. Laws New Mex. 1851–2, pp. 176 and 418. If the plaintiff was not a legal entity and juristic person before, it became such under that law; and it retained that status after Congress included it in the Territory of Arizona, for the act by which this was done extended to that Territory all legislative enactments of the Territory of New Mexico. Act February 24, 1863, c. 56, 12 Stat. 664. The fact that Arizona has since become a State does not affect the plaintiff's corporate status or its power to sue. See *Kansas Pacific R. R. Co.* v. *Atchison, Topeka & Santa Fe R. R. Co.*, 112 U. S. 414.

The case of *Cherokee Nation* v. *Georgia*, 5 Pet. 1, on which the defendants place some reliance, is not in point.

The question there was not whether the Cherokee tribe had the requisite capacity to sue in a court of general jurisdiction, but whether it was a "foreign state" in the sense of the judiciary article of the Constitution and therefore entitled to maintain an original suit in this court against the State of Georgia. The court held that the tribe, although uniformly treated as a distinct political society capable of engaging in treaty stipulations, was not a "foreign state" in the sense intended, and so could not maintain such a suit. This is all that was decided.

The defendants assert with much earnestness that the Indians of this pueblo are wards of the United States—recognized as such by the legislative and executive departments—and that in consequence the disposal of their lands is not within their own control, but subject to such regulations as Congress may prescribe for their benefit and protection. Assuming, without so deciding, that this is all true,[1] we think it has no real bearing on the point we are considering. Certainly it would not justify the defendants in treating the lands of these Indians—to which, according to the bill, they have a complete and perfect title—as public lands of the United States and disposing of the same under the public land laws. That would not be an exercise of guardianship, but an act of confiscation. Besides, the Indians are not here seeking to establish any power or capacity in themselves to dispose of the lands, but only to prevent a threatened disposal by administrative officers in disregard of their full ownership. Of their capacity to maintain such a suit we entertain no doubt. The existing wardship is not an obstacle, as is shown by repeated decisions of this court,

[1] See *Chouteau* v. *Molony*, 16 How. 203, 237; *United States* v. *Ritchie*, 17 How. 525, 540; *United States* v. *Pico*, 5 Wall. 536, 540; *United States* v. *Sandoval*, 231 U. S. 28; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 307; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 568; *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 310, *et seq.*

of which *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, is an illustration.

In view of the very broad allegations of the bill, the accuracy of which has not been challenged as yet, we have assumed in what has been said that the plaintiff's claim was valid in its entirety under the Spanish and Mexican laws, and that it encounters no obstacle in the concluding provision of the sixth article of the Gadsden Treaty, but no decision on either point is intended. Both involve questions not covered by the briefs or the discussion at the bar and are left open to investigation and decision in the further progress of the cause.

Of course, the Court of Appeals ought not to have directed the entry of a final decree awarding a permanent injunction against the defendants. They were entitled to an opportunity to answer to the merits, just as if their motion to dismiss had been overruled in the court of first instance. By the direction given they were denied such an opportunity, and this was a plain and prejudicial error.

Our conclusion is that the decrees of both courts below should be reversed and the cause remanded to the court of first instance with directions to overrule the motion to dismiss, to afford the defendants an opportunity to answer the bill, to grant an order restraining them from in any wise offering, listing or disposing of any of the lands in question pending the final decree, and to take such further proceedings as may be appropriate and not inconsistent with this opinion.

Decree reversed.